Supreme Court, U.S.
FILED

982025 APR 12 1999

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

KIRK D. PIKE and MARY IRENE PIKE, husband and wife,

Petitioners,

v.

ARIZONA DEPARTMENT OF TRANSPORTATION; DAVID RAY SEMM and JANE DOE SEMM, husband and wife,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arizona

PETITION FOR A WRIT OF CERTIORARI

C. RANDALL STONE, Esq.
(*Counsel of Record*)
905 Richmond Road
Williamsburg, Virginia 23185
(757) 229-6770

DOUGLAS B. PRICE, Esq.
401 W. Baseline Road, Ste. 201
Tempe, Arizona 85283
(602) 345-8100

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

120SP

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A.R.S. § 12-821, THE ONE-YEAR STATUTE LIMITING PERSONAL INJURY ACTIONS AGAINST THE STATE, AS ENACTED BY THE ARIZONA LEGISLATURE IN 1993, IS UNCONSTITUTIONAL AS IN VIOLATION OF THE EQUAL PROTECTION CLAUSES OF BOTH THE ARIZONA AND UNITED STATES CONSTITUTIONS.

II. WHETHER A.R.S. § 12-821, AS ENACTED BY THE LEGISLATURE IN 1993, WAS SUBMITTED TO THE PEOPLE BY REFERENDUM, AND REJECTED BY THE VOTERS IN 1994 AS PROPOSITION 301.

LIST OF PARTIES AND RULE 29.6 DISCLOSURE

The parties to these proceedings are Kirk D. Pike and Mary Irene Pike, a husband and wife residing in Gilbert, Maricopa County, Arizona, and the Arizona Department of Transportation, an agency of the State of Arizona. David Ray Semm, a driver for the Arizona Department of Transportation is also named as a defendant, together with Jane Doe Semm, the fictitious name of Mr. Semm's spouse if he is married, in order to include her community property interest in the suit.

There are no other parties in this case, and, pursuant to Rule 29.6, there are no corporate parties in this case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES AND RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
CITATIONS OF THIS CASE	1
BASIS FOR JURISDICTION BY THE SUPREME COURT	1
CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THIS PETITION	6
I. EQUAL PROTECTION	6
a. Right to sue is a fundamental right in Arizona	8
b. Sovereign immunity	9
c. Different rules for different plaintiffs	13
d. Other limitation of actions cases	14
II. REJECTION OF PROPOSITION 301 BY THE PEOPLE	15
a. Effect of referendum on A.R.S. Section 12-821	17
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

Bendix v. Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888 (1988) 14

Crisp v. Thomas, 63 L.T.N.S. 756 (1890) 11

Clark v. Jeter, 486 U.S. 456 (1988)..... 14

G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982)..... 15

Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984) 8, 11, 12

Look v. State, 207 A.2d 907 (Me., 1970) 14

Pike v. Ariz. Dept. of Transportation, 261 Ariz. Adv. Rep. 29 (Ct. App. 1998), petition for review den. at ___ Ariz. Adv. Rep. ___ (1999) 1, 7, 9

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) 14, 15

Ryan v. State, 134 Ariz. 308, 656 P.2d 597 (1982)..... 12

Stanley v. City and County of San Francisco, 121 Cal. Rptr. 842, 48 C.A.3d 575 (Cal. App., 1975) 7

State v. Sharp, 21 Ariz. 424, 189 P. 631 (1920).. 9, 11, 12

Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963) 7, 9, 10, 12

Zeigler v. Kerschner, 162 Ariz. 77, 781 P.2d 54 (Ct. App., 1989)..... 6

CONSTITUTIONAL PROVISIONS

United States Constitution:

Amendment XIV.....2, 16

Amendment XIX..... 16

TABLE OF AUTHORITIES – Continued

Page

Amendment XXVI 16

Article I, § 8 3

Arizona Constitution:

Article 2, § 31 10

Article 12, § 13 3

Article 18, § 6 11

STATUTES

Arizona Revised Statutes:

§ 12-542 3

§ 12-551 3

§ 12-561 3

§ 12-820 ..... 6, 13

§ 12-821 ..... *passim*

FEDERAL STATUTE

42 U.S.C. § 1973(b) 16

LAW REVIEW ARTICLES

"The crown jewel of American liberty: The right to vote; What does it mean under the amended Section 2 of the Voting Rights Act?" Bobby M. Rubarts, 37 Baylor L.Rev. 1015 (1984) 16

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Kirk D. Pike and Mary Irene Pike, husband and wife, hereby respectfully petition the Supreme Court of the United States for a writ of certiorari to review a decision of the Supreme Court of Arizona which denied review of a split decision of the Arizona Court of Appeals, Division I.

CITATIONS OF THIS CASE

Kirk D. Pike and Mary Irene Pike v. Arizona Department of Transportation; David Ray Semm and Jane Doe Semm, 261 Ariz. Adv. Rep. 29 (Ct. App., 1998), petition for review denied at ___ Ariz. Adv. Rep. ___ (1999).

BASIS FOR JURISDICTION BY THE SUPREME COURT

(i) The Supreme Court of Arizona denied review of this case on January 12, 1999, thereby affirming the majority decision of the Arizona Court of Appeals, Division I, which was filed on January 29, 1998 and modified on February 10, 1998. This petition is filed in compliance with Supreme Court Rule 11.

(ii) No orders respecting rehearing are pending nor has any request been made for an extension of time to file the petition for writ of certiorari.

(iii) Rule 12.5 does not apply to this petition for writ of certiorari at this time.

(iv) This Court has jurisdiction to review on a writ of certiorari pursuant to **28 U.S.C. Section 1257.**

(v) Rule 29.4(b) does not apply to this case. The Attorney General of Arizona is receiving a copy of this document in compliance with Rule 14.1(e)(v), since the State of Arizona is a party to this action.

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED IN THIS CASE

ISSUE I – STATUTE:

Section 12-821. General limitation; public employee

All actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward.

ISSUE I – CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

ARIZONA CONSTITUTION, ARTICLE 12, SECTION 13

No law shall be enacted granting to any citizen, class of citizens, or corporations other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

UNITED STATES CONSTITUTION, Article I, Section 8

The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

ISSUE II – STATUTES

Section 12-821 as stated above.

Section 12-542. Injury to person; Injury when death ensues; injury to property; conversion of property; forcible entry and forcible detainer; two year limitation

Except as provided in Section 12-551, there shall be commenced and prosecuted within two years after the cause of action accrues, and not afterward, the following actions:

1. For injuries done to the person of another including causes of action for medical malpractice as defined in Section 12-561.

2. [balance of statute is irrelevant to this case] . . .

STATEMENT OF THE CASE

On January 12, 1999, the Supreme Court of Arizona denied the Petition for Review that had been filed by Petitioners on March 2, 1998. The Petition sought review by the highest Arizona Court for a split decision by the Arizona Court of Appeals on January 29, 1998. In that decision the majority (Justices Tocci and Ryan) decided that the one-year statute of limitations for actions against the State was constitutional under the United States and Arizona Constitutions. Justice Grant, in her vigorous dissent, decided that the one-year statute was unconstitutional as violative of equal protection.

The case in the Court of Appeals was briefed in December, 1996, January, 1997 and February, 1997, with oral argument held to the three judge panel, Justices Grant, Ryan and Tocci, on April 29, 1997.

After filing the Petition for Review by the Arizona Supreme Court, petitioners received a Brief of Amicus Curiae from the Arizona Trial Lawyers Association dated Sept. 2, 1998 and an Amicus Curiae brief from James and Minerva Hightower dated May 8, 1998.

The case stems from a motor vehicle collision which occurred on August 2, 1993 in Tempe, Maricopa County, Arizona, between a truck driven by Kirk Pike and a street cleaner owned by the Arizona Department of Transportation, driven by David Semm, a state employee. Kirk Pike was seriously injured, sustaining head injuries resulting in memory loss and chronic pain. Damages are estimated to be in excess of $50,000. During October of 1993 a state risk management adjuster met with Pike's attorney on the case, and corresponded with the attorney in December,

1993. On August 1, 1994, a Notice of Claim was served on the state in compliance with A.R.S. § 12-821 as it existed before the passage of SB 1055 in the 1993 legislative session. Kirk and Mary Pike's complaint against The Arizona Department of Transportation and David and Jane Doe Semm was filed on June 30, 1995, in the Superior Court of Maricopa County in compliance with the previous 2 year statute of limitations. All defendants filed a motion to dismiss on November 15, 1995, for failure to state a claim, specifically, failure to file within the applicable statute of limitations. Oral argument was held on April 17, 1996, before the Honorable Paul A. Katz, Judge of the Superior Court of Maricopa County. Judgment of dismissal with prejudice as to all defendants was filed on April 29, 1996.

The Pikes filed a timely Motion to Reconsider in Superior Court on May 15, 1996. This motion was denied on May 21, 1996. The Pikes filed a timely Notice of Appeal on May 24, 1996, from the Judgment entered on April 29, 1996.

Stage of Proceedings – History

The Federal questions sought to be reviewed in this case, including the questions of Constitutional law (equal protection) were raised by the petitioners in their Response to Respondent's Motion for Summary Judgment in Superior Court. A transcript of the oral argument on said Motion is attached as Appendix L. The Federal questions were again presented on appeal in Petitioner's Opening Brief filed with the Arizona Court of Appeals on December 6, 1996 and in oral argument to the Court of Appeals in April, 1997. The Petition for Review (by the

Arizona Supreme Court) filed in the Arizona Court of Appeals on March 2, 1998 raised the Federal questions once again, though in a state context.

In the history of this case it is interesting to note that the Notice of Claim statute is not an issue because Petitioners complied with the prior law, A.R.S. § 12-821 (added laws 1984), found in Appendix G which was inadvertently replaced in 1993 by the legislative enactment of ARS § 12-821 (added by laws, 1993), found in Appendix E. The result is that no Notice of Claim statute existed until 1994, at which time the Arizona legislature, in a special session, passed ARS § 12-821.01 (added by laws, 1994), found in Appendix F. Thus Arizona's present 6 month Notice of Claim statute is not at issue in this case; only the issue of whether the Statute of Limitations is one year or two is before the Court.

REASONS FOR GRANTING THIS PETITION

I. EQUAL PROTECTION

First, a word of caution. This case does not seek to advance the doctrine that there is no governmental immunity. In Arizona, governmental immunity is set forth in A.R.S. Section 12-820.01 as absolute immunity for unique governmental functions such as exercising judicial or legislative functions, exercising administrative functions or determining resources for governmental functioning. *Zeigler v. Kirschner*, 162 Ariz. 77, 781 P.2d 54 (Ct. App., 1989). Petitioners respect this law and have not challenged it.

Petitioners simply request that when government does the same kinds of things that private individuals and corporations do, whether it is driving on the roads or cleaning the street, that the same rules apply equally to government as to the private parties.

Petitioners also recognize that notice of claim statutes have been upheld on constitutional grounds in many states and places to promote settlement of claims and avoid litigation. *Stanley v. City and County of San Francisco,* 121 Cal.Rptr. 842, 48 C.A.3d 575 (Cal. App., 1975).

This is a case of first impression. Because the case involves motor vehicles on public roads, the case may affect interstate commerce. The equal protection issues are of national importance because, while many states have ruled that notice of claim statutes are constitutional, petitioners are aware of no other case where a state has imposed such separate and unequal statutes of limitation, thus creating two classes of plaintiffs. This is NOT a notice of claims case as the present 6 month Arizona notice of claims statute was enacted AFTER *Pike.* Further in deciding *Pike,* the Court of Appeals majority ignored important Arizona precedent by judicially reviving the previously defunct and inappropriate 19th century doctrine of sovereign immunity in order to reach its decision. Arizona specifically rejected the doctrine of soverign immunity in *Stone v. Arizona Highway Comm'n,* 93 Ariz. 384, 381 P.2d 107 (1963).

a. Right to sue is a fundamental right in Arizona

The Court of Appeals majority specifically held that the Arizona "constitutional right to recover for injuries does not include a fundamental right to sue the state for negligence." Slip op. ¶14. Judge Grant, in her dissent, stated "That statement is erroneous." Slip op. ¶31. The dissent further stated: "The Arizona Constitution did not limit this right by adding the words 'except against the state or its entities.' I see no reason for this court to add such language judicially." Slip op. ¶33. In *Kenyon v. Hammer*, the Supreme Court of Arizona affirmed that the right to sue is a fundamental right. *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961 (1984).

Whether or not such a fundamental right exists may be important, because it governs the test to be applied under the equal protection clauses of both the Arizona and Federal Constitutions. The state argues that there is no fundamental right, and therefore the "reasonable basis" test must be applied. Petitioners argue that the "strict scrutiny" test must be applied, because it is a fundamental right, although petitioners also maintain that this statute does not pass muster even under the more lenient "rational basis" test.

Applying the "rational basis" test, the Court of Appeals majority found the statute in question constitutional. As stated above, this is a matter of considerable moment, for it concerns the statute of limitations for all personal injury actions against public entities or employees. Further, it also involves the attempted or apparent resurrection of the abolished doctrine of sovereign immunity, and its application to the question of

whether or not the otherwise fundamental right to sue for personal injuries exists as to the state. After *Pike*, lawyers for the state can argue that while the right to sue may be fundamental, the right to sue the state is not. This is a fundamental and unfair change in the law and creates a trap for the unwary.

b. Sovereign immunity

The linchpin of the majority conclusion that there is no fundamental right to sue the state for personal injuries is its conclusion that sovereign immunity was the law in Arizona when the constitution was adopted in 1910. "A right of action against the state was not recognized in the common law when the Arizona constitution was adopted . . . " Slip op. ¶15. Indeed, the majority said of the 1920 *Sharp* case: " . . . the common law rule of sovereign immunity was so well settled that had the issue come before an Arizona court earlier, it would have been applied by the court." Slip op. ¶15.

Certainly the unanimous Arizona Supreme Court in the *Stone* case did not agree with the majority's holding that sovereign immunity was the law in 1910:

> These two cases [The English case and the Massachusetts case cited by Justices Ryan and Tocci] seem to have set the tumbleweed in motion and nearly every state *adopted* [emphasis supplied] this same theory as to sovereign liability for torts of its agents or employees. [citing cases, including *State v. Sharp.*] *Stone* at 110.

Stone then went on to say:

> The first case in Arizona which held that the sovereign was immune from tort liability occasioned by the negligence of its agents was State v. Sharp, supra. Without examining any real basis or reason for sustaining the doctrine this court stated: [Here the court quoted the same paragraph used by the majority in the instant case.] This case set a precedent and other Arizona cases have since followed the rule without arriving at any basis other than that of stare decisis. *Stone* at 110.

Later on, in arriving at its decision, *Stone* said:

> . . . Upon reconsideration we realize that the doctrine of sovereign immunity was *originally judicially created.* [emphasis supplied] We are now convinced that a *court-made rule,* when unjust or outmoded, does not necessarily become with age invulnerable to judicial attack. [emphasis supplied] This doctrine having been *engrafted on Arizona law by judicial enunciation* may properly be changed or abrogated by the same process. [emphasis supplied] *Id.* at 113.

It is manifestly obvious that one cannot adopt something one already has, create something that already exists, make something that is already made, and certainly one cannot engraft a doctrine on Arizona law that is already there.

Petitioners assert that it is demonstrably doubtful in the extreme that the framers and adopters of the constitution in 1910 ever expected that the "doctrine" of sovereign immunity would be applied to their language, or that it was the existing law in Arizona. Nowhere in Art. 2,

§ 31 and Art. 18, § 6 is sovereign or governmental immunity mentioned as an exception. Rather, the avowed intention was to preserve the right of action for "all persons." See the discussion of the convention in footnote 9 of *Kenyon v. Hammer*, 142 Ariz. 69, 688 P. 2d 951 (1984). England, the source of this doctrine by case law, had already abolished it by case law in 1890. *Crisp v. Thomas*, 63 L.T.N.S. 756 (1890).

No authority was cited by the majority in the instant case for their conclusion that before the *Sharp* case it was "well settled" that the Arizona common law included the doctrine of sovereign immunity. Neither did the *Sharp* case cite any such authority. Rather, that case involved the effect of the following *1913* statute:

> All persons who have, or who shall hereafter have claims on contract or for negligence against the state, which have been disallowed, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the state in any of the courts of this state of competent jurisdiction, and prosecute the same to final judgment. The rules and practice in civil cases shall apply to such suits except as herein otherwise provided. ¶1791, Civil Code 1913.

To anyone unacquainted with the vagaries of judicial reasoning of this previous era this would seem to mean what it says: that suits against the state, under the named conditions, were allowed, else the language is meaningless. But in reversing the trial judge, the *Sharp* court concluded, based on several California cases of the era, that this act merely provided a remedy, but did not itself provide for liability.

However, in reading the *Sharp* opinion, one conclusion is inescapable: the existence of the 1913 statute and the arguments of the court in that case are incompatible with an assertion that the law of Arizona was "well settled" on the question of sovereign immunity in Arizona during the ten years following the adoption of the constitution. Read with the *Stone* opinion, one can only conclude that sovereign immunity, if it existed at all in Arizona, existed only by judicial fiat from 1920 to 1963.

The majority Court of Appeals opinion has the effect of freezing in time the right to sue for personal injuries in Arizona. The majority position is that if the right to sue the state did not exist in 1910, it does not exist now. Petitioners read the effect of *Stone v. Arizona Highway Comm'n* otherwise, and assert that it was the intention of this court to *totally abolish* sovereign immunity in this state as it applies to personal injury actions. Thus *Stone* reinstated the right to sue the state, which actually existed in 1910, to those fundamental rights enjoyed by its inhabitants, as described in *Kenyon*. The dissenting opinion in the instant case agrees with *Stone*, and questions that sovereign immunity ever existed, and points out a contrary common law of this state, enunciated in *Stone*, to the effect that "where negligence is the proximate cause of injury, the rule is liability and immunity is the exception." 93 Ariz. at 193, 381 P.2d at 107. The dissent then quotes from the *Ryan* decision, which expressly equated, as ordinarily coextensive, "the parameters of duty owed by the state" to those owed by others. *Ryan v. State*, 134 Ariz. 308, 656 P.2d 597 (1982).

Again, the majority argues that the existence of absolute and qualified immunity for certain state employees

under certain conditions (generally A.R.S. § 12-820.01 to § 12-820.05) is evidence that the state may make other classifications without concerning itself with their constitutionality. These statutes are not in issue in this case, nor does their existence in any way derogate from Petitioners' argument. Rather petitioners argue that all such statutes must pass the strict scrutiny required for equal protection, as dealing with a fundamental right in Arizona. Petitioners believe that it is possible that many statutes such as those mentioned by the majority will pass constitutional scrutiny as representing a compelling state interest. Some undoubtedly do, particularly those involving judicial or governmental decisions. But the fact that some statutes creating separate classifications will pass constitutional muster does not justify a conclusion that *all* do. Each must stand on its own feet. A.R.S. § 12-821 will not stand up under either the strict scrutiny *or* the rational basis test, first, under strict scrutiny, because the state has not shown, or even attempted to show, a compelling state interest in shortening the limitations period for itself alone, and second, under the rational basis test, it has not shown that there is a rational basis for a separate limitation period for itself, particularly when it has a notice of claim statute, as opposed to all the other individual and corporate defendants involved in personal injury litigation.

c. Different rules for different plaintiffs

The Supreme Court of Maine held that certain property owners could not have special "private legislation" enabling them to sue the state when others could not. They held that the legislation, which extended what

would have been a 6 month statute of limitations, denied equal protection. *Look v. State*, 207 A.2d 907 (Me., 1970).

d. Other limitation of actions cases

This Court, in *Clark v. Jeter*, 486 U.S. 456 (1988) held that the Pennsylvania 6 year statute of limitations preventing a mother from filing a paternity action violated equal protection under an intermediate scrutiny analysis. In reaching this decision, Justice O'Connor noted the public policy considerations involved in not allowing a reasonable opportunity to assert a claim on behalf of an illegitimate child. *Clark* at 463. Similarly, this Supreme Court may wish to decide whether it is sound public policy to impose two sets of rules on plaintiffs, one for private defendants and another for the state. This is but another aspect of equal protection.

Public policy concerns were also an issue in *Bendix v. Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988) in which this Court held that an Ohio statute tolling the statute of limitations for an out-of-state defendant violated the commerce clause by imposing an impermissible burden on interstate commerce. The Court did not characterize this as an equal protection argument but the fact was that the statute created two classes of non-residents, those who appointed statutory agents and were exposed to process and those who did not appoint statutory agents and were thereby exposed to liability in perpetuity due to the tolling statute. *Bendix* at 893-894.

In *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), the Court again visited the Ohio statute of limitations in holding that a retroactive application of *Bendix* did not

make a difference to allow the defendant to prevail. *Reynoldsville* at 758-759.

Finally, in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), this Court, applying a rational basis test, remanded a case involving a tolling limitation period for an out-of-state corporate defendant, so that the United States Court of Appeals below could consider a commerce clause argument. *G.D. Searle* at 405, 414.

Petitioners, therefore, submit that this issue is an appropriate and fitting subject for review by this Supreme Court, a split of opinion on the matter already having occurred in the Arizona Court of Appeals and having been affirmed by the Arizona Supreme Court.

II. REJECTION OF PROPOSITION 301 BY THE PEOPLE

Most disturbing in this case is the fact that by popular vote, the voters of Arizona by referendum, in November, 1994, repealed the shorter 1 year statute. The ballot stated that "An Act Imposing a Time Limit for Filing Certain Lawsuits" was to be voted yes or no. The voters were also told that a "no" vote would have the effect of not approving the Legislature's changes to Arizona's civil justice system. The voters voted no by a vote of 656,407 to 404,231 yes votes. These votes were certified by the Governor. Yet the changes to the law, including the short statute of limitations, were enacted anyway, and are followed as "Arizona law".

At oral argument in the court of appeals, the Attorney General took the position that the publicity pamphlet, not the ballot, controlled the referendum results. Yet in stating this position the Attorney General admitted that there was **no legal basis** for it. In fact, the sanctity of the election process requires that a ballot be truthful. If the ballot is going to refer to extraneous material, at least it should be noted or a warning given.

The voters of Arizona and every state enjoy Constitutional and statutory protections. They cannot be given a poll tax or literacy test. Amendment XIV. They cannot be denied the right to vote based on their sex. Amendment XIX. They cannot be denied the right to vote after their 18th birthday. Amendment XXVI. Voters must be provided with a ballot in their own language. Voting Rights Act, 42 U.S.C. § 1973(b).

The right to vote is called 'the crown jewel of American liberty'. See "The crown jewel of American liberty: The right to vote; What does it mean under the amended Section 2 of the Voting Rights Act?" Bobby M. Rubarts, 37 Baylor L.Rev. 1015 (1984).

In this case, if the publicity pamphlet is allowed to control the ballot, the misleading nature of the result will nullify the ballot and make a mockery of the practice of citizens casting ballots. However, there is no legal reason why the publicity pamplet should control under Arizona law. The Supreme Court of the United States has the right and the duty to insure that all United States elections are fair and legal, to insure that our representative democracy continues to function, and to ensure that voters can trust that what they believe they are voting for is in fact

what they are getting. Copies of the ballot and the election certification are included in the Appendix.

a. Effect of the referendum on A.R.S. § 12-821.

Although the majority Court of Appeals opinion admits that the text of Proposition 301, as contained in the Referendum of 1994, "might lead the reader to believe that the changes to A.R.S. section 12-821 were among the measures submitted to the voters in the referendum" it explains away this supposed mishap by asserting as a "fact" that the text of Proposition 301 indicates that it is "merely the entire official title of the tort reform act passed by the legislature in 1993 as Senate Bill 1055." Slip op. ¶¶22 and 23. This is not correct. The words "official title" on the ballot refer to the *referendum*, not the Tort Reform Act, as is pointed out in the majority's own footnote to paragraph 21. See footnote 4, Slip op. ¶21, and Appendix A attached. Nowhere in the text of Proposition 301 is there any such "indication" that the Proposition to be voted on is merely the official title of the Tort Reform Act. Nor is any such indication contained in the Attorney General's explanation supposedly provided for the enlightenment of the voters. The voters were told they were voting on an act doing the listed things, they voted on it, and rejected it.

Only in the publicity pamphlet do any exceptions appear, raising squarely the question of the effect of language contained *only* in the publicity pamphlet. But this question was not addressed by the majority, because they found the "facts" to be otherwise. We are merely

told that the publicity pamphlet is entitled to "some" weight in constitutional construction. Slip op. ¶23.

The argument of the majority that the annotated statutes carry any weight in resolving this conflict can only be described as a "bootstrap" argument. The statute codifiers have no authority to alter the results of a referendum as decided by the voters and proclaimed by the governor, nor has the majority dared to make this assertion. See Appendix, Governor's Proclamation. The annotated statutes merely confirm the original mistake of copying *only* from the publicity pamphlet, rather than from the official ballot language actually read and considered by the voters in the election. This issue, then, is essentially a truth in balloting issue, raising the question: "Did the voters get what they believed they were voting for or against, as the case may be?" Petitioners assert that, if the publicity pamphlet is allowed to control over the ballot language, without even so much as a footnote, then the voters cannot trust the process of the referendum. During oral argument in the Court of Appeals, the panel requested that the Attorney General state the legal basis by which the publicity pamphlet can control over the language of the ballot. Tellingly, at oral argument before the Arizona Court of Appeals, the Attorney General admitted that it was the position of the state that the publicity pamphlet controlled, but that there was no legal authority to support the position.

In this case the voters were specifically asked whether they wanted to shorten the statute of limitations. The majority of voters cast their "no" ballot. It is tantamount to voter fraud for the state to change this ballot by

arguing that the voters did not "really" reject the shorter statute.

CONCLUSION

This case presents substantial and important federal questions and the Supreme Court should accept jurisdiction in this case to review both issues presented.

Respectfully submitted,

C. RANDALL STONE, Esq.
(*Counsel of Record*)
905 Richmond Road
Williamsburg, VA 23185
(757) 229-6770

LAW OFFICES OF
DOUGLAS B. PRICE, P.C.
DOUGLAS B. PRICE, Esq.
401 W. Baseline Rd. Ste. 201
Tempe, Arizona 85283
Tel. (602) 345-8100

Attorneys for Petitioners

TABLE OF CONTENTS

Page

APPENDICES

APPENDIX A, opinion below, Arizona Supreme Court A1

APPENDIX B, opinion below, Arizona Court of Appeals B1

APPENDIX C, opinion below, Order dated Feb. 10, 1998 ..... C1

APPENDIX D, ARS Section 12-542 (general 2 year statute of limitations) D1

APPENDIX E, ARS Section 12-821 (special 1 year statute of limitations) E1

APPENDIX F, ARS Section 12-821.01 (180 day notice of claim statute) F1

APPENDIX G, ARS Section 12-821 (prior law, 12 month notice of claim statute) G1

APPENDIX H, Ballot Format Proposition 301 ..... H1

APPENDIX I, Governor's Proclamation I1

APPENDIX J, Amicus Brief, James and Minerva Hightower J1

APPENDIX K, Amicus Brief, Arizona Trial Lawyers Association K1

APPENDIX L, Reporter's Transcript of Proceedings in Superior Court L1

APPENDIX A

[SEAL]

Supreme Court

STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3329

TELEPHONE: (602) 542-9396

NOEL K. DESSAINT
CLERK OF COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

January 20, 1999

RE: KIRK D. PIKE/MARY IRENE PIKE vs. ARIZONA DEPARTMENT OF TRANSPORTATION/DAVID RAY SEMM et ux
Supreme Court No. CV-98-0149-PR
Court of Appeals No. 1 CA-CV 96-0443
Maricopa County No. CV 95-10616

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on January 12, 1999, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

FURTHER ORDERED: The Court of Appeals' Opinion shall not be published, pursuant to Rule 111(g), Arizona Rules of the Supreme Court.

Justice Martone dissents from the order of depublication.

Record returned to the Court of Appeals, Division One, Phoenix, this 20th day of January, 1999.

NOEL K. DESSAINT, Clerk

TO:
Douglas B. Price, Esq.
Theodore E. Carver, Esq., Law Office of Theodore E. Carver
Hon. Janet Napalitano, Attorney General
ATTN: Deborah J. Spinner, Esq.
Wayne C. Arnett, Esq., Arnett & Arnett
Amy G. Langerman, Esq., The Langerman Law Offices
Glen D. Clark, Clerk, Court of Appeals, Division One,
Phoenix West Publishing Company
Lexis Nexis

lgs

APPENDIX B

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

KIRK D. PIKE and MARY IRENE PIKE, Plaintiffs-Appellants, v. ARIZONA DEPARTMENT OF TRANSPORTATION; DAVID RAY SEMM and JANE DOE SEMM, husband and wife, Defendants-Appellees.	1 CA-CV 96-0443 DEPARTMENT A OPINION (Filed Jan. 19, 1998)

Appeal from the Superior Court of Maricopa County

Cause No. CV 95-10616

The Honorable Paul Katz, Judge

AFFIRMED

Law Office of Douglas B. Price, P.C.
by Douglas B. Price — Tempe
and
Law Office of Theodore E. Carver
by Theodore E. Carver — Phoenix
Attorneys for Appellants

Grant Woods, Arizona Attorney General
by Deborah J. Spinner and Thomas J. Dennis,
Assistant Attorneys General
Attorneys for Appellees — Phoenix

RYAN, Judge

¶1 Appellants filed their personal injury action against appellees about twenty-three months after their cause of action accrued. The trial court dismissed the action, ruling that the one-year statute of limitations in Arizona Revised Statutes Annotated ("A.R.S.") section 12-821 applied to and barred their complaint against the state. Appellants challenge the constitutionality of that statute of limitations on equal protection grounds.

¶2 We hold that the statute of limitations in A.R.S. section 12-821, which applies to governmental entities and employees, does not violate equal protection rights and is constitutional. We also conclude that the statute was not referred to or repealed by voters in the November 1994 referendum election, and therefore, the statute applied in this case.

BACKGROUND

¶3 On August 2, 1993, appellant Kirk Pike was injured in a collision with a street cleaning vehicle owned by Arizona Department of Transportation ("ADOT") and driven by ADOT employee David Semm. On August 1, 1994, Pike served a notice of claim on the state. Pike and his wife filed their lawsuit against ADOT and Semm (collectively "ADOT") on June 20, 1995.

¶4 ADOT moved to dismiss the complaint, arguing that it had not been filed within the one-year statute of limitations period imposed by A.R.S. section 12-821. The Pikes argued that the implementation of section 12-821, which had been revised by the legislature in 1993, was stayed by

the referendum decided by voters in the November 1994 election, and thus the previous two-year statute of limitations applied to their action. They also argued that imposing a shorter statute of limitations for claims against the state than for claims against private tortfeasors violated both the Arizona and United States Constitutions.

¶5 The trial court granted ADOT's motion and entered judgment dismissing the action. After the court denied the Pikes' motion for reconsideration, they timely appealed from the judgment. This court has jurisdiction. A.R.S. § 12-2101(B).

DISCUSSION

A. Constitutionality of the One-Year Statute of Limitations of A.R.S. Section 12-821

¶6 We begin with the well-established principle that statutes are presumed to be constitutional. *Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143, 148, 800 P.2d 1251, 1256 (1990). The party asserting that a statute is unconstitutional has the burden of clearly demonstrating that it is. *State v. Cameron*, 185 Ariz. 467, 469, 916 P.2d 1183, 1185 (App. 1996); *see also Landgraff v. Wagner*, 26 Ariz. App. 49, 53, 546 P.2d 26, 30 (1976).

¶7 The Pikes argue that A.R.S. section 12-821, as enacted by the Arizona Legislature in 1993, is unconstitutional because it violates the equal protection clauses of the Arizona and United States Constitutions. *See* U.S. CONST. amend. XIV; ARIZ. CONST. art. 2, § 13. This is so, they contend, because persons with personal injury

claims against private parties have two years after their causes of action accrue in which to file their lawsuits. *See* A.R.S. § 12-542. Persons with personal injury claims against the state, on the other hand, must file their lawsuits within one year after accrual. A.R.S. § 12-821.[1]

¶8 We first note that the constitutional right to bring an action to recover damages for injury guaranteed by article 18, section 6, is subject to a reasonable statute of limitations. *Rutledge v. State*, 100 Ariz. 174, 180, 412 P.2d 467, 472 (1966); *Landgraff*, 26 Ariz. App. at 54, 546 P.2d at 31. Additionally, the Arizona Constitution grants the legislature the power to "direct by law in what manner and in what courts suits may be brought against the State." ARIZ. CONST. art. 4, pt. 2, § 18. "The legislature may restrict an individual's right to sue the state and the manner in which a suit may be maintained." *Landry v. Superior Ct.*, 125 Ariz. 337, 338, 609 P.2d 607, 608 (App. 1980). Likewise, the legislature may constitutionally classify persons and things or pass laws that apply only to persons within

---

[1] The version of A.R.S. section 12-821 in effect before 1993 was deleted by the legislature in its 1993 First Regular Session. Laws 1993, Ch. 90, § 7. The legislature adopted a new section 12-821, which provided: "All personal injury actions against any public entity or public employee involving acts that are alleged to have occurred within the scope of the public employee's employment shall be brought within one year after the cause of action accrues and not afterward." Laws 1993, Ch. 90, § 8. The new statutory language went into effect on July 17, 1993; thus, it applies to Pike's August 2, 1993, accident. Section 12-821 was amended in 1994 to read: "All actions against any public entity or public employees shall be brought within one year after the cause of action accrues and not afterward." Laws 1994, Ch. 162, § 1.

a designated class as long as that classification is neither arbitrary nor unreasonable. *Landgraff*, 26 Ariz. App. at 55, 546 P.2d at 32; *see also Kenyon v. Hammer*, 142 Ariz. 69, 87, 688 P.2d 961, 979 (1984) ("Classification of claims for limitation purposes has traditionally been a legislative prerogative."). Such restrictions do not necessarily abrogate the constitutional right to recover damages for injury. *Landgraff*, 26 Ariz. App. at 54, 546 P.2d at 31.

¶9 When deciding whether a statute violates equal protection, we must first determine the appropriate standard of review to apply: the rational basis test, intermediate scrutiny, or strict scrutiny. *Kenyon*, 142 Ariz. at 78-79, 688 P.2d at 970-71. Our choice depends on the nature of the classification and the type of state interest affected by the statute. *Id.* If no suspect class is involved, the determination rests on the nature of the right at issue. *Id.* at 79, 688 P.2d at 971.

¶10 For example, a challenge to a statute regulating a fundamental right is subject to a strict scrutiny analysis. *See id.* Under strict scrutiny, a discriminatory statute is valid only if it serves a "compelling state interest" and is necessary to achieve the legislative objective of the statute. *Id.* at 78-79, 688 P.2d at 970-71. The Pikes maintain that the right to bring a cause of action for recovery of damages for personal injury is a fundamental right under Arizona Constitution article 18, section 6. *See id.* at 83, 688 P.2d at 975; *accord Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 143 Ariz. 101, 104, 692 P.2d 280, 283 (1984). Therefore, they argue, the one-year statute of limitations of A.R.S. section 12-821 should be subject to strict scrutiny review. *See Kenyon*, 142 Ariz. at 79, 688 P.2d at 971.

¶11 ADOT, on the other hand, argues that A.R.S. section 12-821 permissibly limits the means by which a party sues the state, but does not abolish the constitutional right to sue. *See* ARIZ. CONST. art. 4, pt. 2, § 18; *Landry*, 125 Ariz. at 338, 609 P.2d at 608. ADOT notes that no suspect class is involved here and asserts that although the statute regulates a fundamental right, it does not abrogate the right or affect it enough to justify using strict scrutiny.[2] Therefore, ADOT urges us to use the "rational basis" test.

¶12 The rational basis test is used when the statute in question neither burdens a suspect classification, such as race or religion, nor impinges upon a fundamental right. *See Kenyon*, 142 Ariz. at 79, 688 P.2d at 971. To survive the rational basis test, the statute must serve a legitimate state interest, and the facts must permit the court to conclude that the classification rationally furthers the interest. *Id.* at 78, 688 P.2d at 970; *Eastin v. Broomfield*, 116 Ariz. 576, 583, 570 P.2d 744, 751 (1977). Under this test, equal protection is violated " 'only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective.' " *Kenyon*, 142 Ariz. at 78, 688 P.2d at

---

[2] An intermediate test, known as the "means-scrutiny analysis," has been used by the United States Supreme Court for classifications such as those based upon gender and illegitimacy of birth. *See Kenyon*, 142 Ariz. at 78, 688 P.2d at 970. At least one state court has used this intermediate standard of review to determine whether a statute requiring a notice of claim against a governmental entity violated equal protection. *See James v. Southeastern Pa. Transp. Auth.*, 477 A.2d 1302, 1307 (Pa. 1984). Because neither party before us argues that it should be applied, we do not consider whether this standard of review is appropriate for this case.

970 (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961)).

¶13 We do not believe the holding from *Kenyon* requires us to apply strict scrutiny to determine the constitutionality of A.R.S. section 12-821. The *Kenyon* court applied a strict scrutiny test to analyze whether the "abolition of the discovery rule for some medical malpractice claimants" was constitutional. *Id.* at 83, 688 P.2d at 975. The challenged statute essentially precluded the right to bring and pursue a medical malpractice cause of action before the claim could have been discovered.

¶14 Here, however, the suit is against the state. The history of the sovereign immunity doctrine and case law developments lead us to conclude that the constitutional right to recover for injuries does not include a fundamental right to sue the state for negligence.

¶15 A right of action against the state was not recognized in the common law when the Arizona Constitution was adopted; the common law doctrine of sovereign immunity served to shield governmental entities from tort liability. *State v. Sharp*, 21 Ariz. 424, 426, 189 P. 631, 631 (1920). The doctrine, which originated in eighteenth century England, was first applied in the United States in Massachusetts in 1812. *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 389, 381 P.2d 107, 110 (1963) (citing *Mower v. Inhabitants of Leicester*, 9 Mass. 247 (1812)). The *Sharp* court applied the doctrine in Arizona in 1920, explaining:

> [I]t is well settled by the great weight of authority that the state, in consequence of its sovereignty, is immune from prosecution in the courts and from liability to respond in damages for

> negligence, except in those cases where it has expressly waived immunity or assumed liability by constitutional or legislative enactment.

21 Ariz. at 426, 189 P. at 631. The Arizona Constitution was adopted in 1910, ten years before *Sharp* was decided. This language from *Sharp* indicates, however, that the common law rule of sovereign immunity was so well settled that had the issue come before an Arizona court earlier, it would have been applied by the court.

¶16 In 1963 in *Stone*, the Arizona Supreme Court abolished the common law doctrine of governmental immunity from tort liability in Arizona law. Since *Stone*, the legislature has adopted several statutes concerning immunity of public entities and employees and the requirement for notice of claims. *See* A.R.S. §§ 12-820 to -826; *see also Pritchard v. State*, 163 Ariz. 427, 788 P.2d 1178 (1990); *Evenstad v. State*, 178 Ariz. 578, 875 P.2d 811 (App. 1993).

¶17 Because the state may legislate limited governmental tort immunity as well as set time limits for bringing actions against it, we conclude that the Arizona Constitution does not grant a fundamental right to sue the state. Our conclusion does not contradict the statements in *Kenyon*, *Barrio*, and *Anson v. American Motors Corp.*, 155 Ariz. 420, 423, 747 P.2d 581, 584 (App. 1987), that in Arizona the right to recover damages for bodily injuries is a fundamental right. None of those cases involved an action against a governmental entity, and those courts did not consider whether such a fundamental right exists against the government. Furthermore, in *Evenstad*, we concluded that there was no fundamental right to a cause of action against public entities that

enjoyed absolute immunity, and we applied the rational basis test to an equal protection challenge to the immunity statute. 178 Ariz. at 586, 875 P.2d at 819. Because the Pikes have no fundamental right to sue the state, we consider their challenge to A.R.S. section 12-821 under the rational basis test.

¶18 We acknowledge that courts in some jurisdictions have found that notice of claim statutes and short statute of limitations periods for tort actions against governmental entities violate equal protection. *See Miller v. Boone County Hosp.*, 394 N.W.2d 776 (Iowa 1986) (sixty-day notice period/six-month statute of limitations); *Kossak v. Stalling*, 277 N.W.2d 30 (Minn. 1979) (one-year statute of limitations); *Turner v. Staggs*, 510 P.2d 879 (Nev. 1973) (six-month notice period); *Hunter v. North Mason High Sch.*, 539 P.2d 845 (Wash. 1975) (120-day notice period); *O'Neil v. City of Parkersburg*, 237 S.E.2d 504 (W. Va. 1977) (thirty-day notice period).[3] However, most jurisdictions that have considered such a constitutional challenge have concluded that notice of claim and statute of limitations rules placed on persons bringing tort actions against governmental entities are rationally related to reasonable legislative purposes and thus do not violate equal protection. *See, e.g., Tammen v. San Diego County*, 426 P.2d 753 (Cal.

---

[3] Although many of the cases from other jurisdictions that we cite concern equal protection challenges to notice of claim statutes and the statute at issue here is a statute of limitations, the notice of claim statutes analysis applies because notice provisions operate like statutes of limitations: a timely claim must be filed before filing suit. *See Pritchard*, 163 Ariz. at 430, 788 P.2d at 1181 (timely claim filing requirement is analogous to statute of limitations).

1967); *Fritz v. Regents of Univ. of Colo.*, 586 P.2d 23 (Colo. 1978); *McCann v. City of Lake Wales*, 144 So. 2d 505 (Fla. 1962); *Newlan v. State*, 535 P.2d 1348 (Idaho 1975); *King v. Johnson*, 265 N.E.2d 874 (Ill. 1970); *Johnson v. Maryland State Police*, 628 A.2d 162 (Md. 1993); *Campbell v. City of Lincoln*, 240 N.W.2d 339 (Neb. 1976); *Espanola Housing Auth. v. Atencio*, 568 P.2d 1233 (N.M. 1977); *Herman v. Magnuson*, 277 N.W.2d 445 (N.D. 1979); *Reirdon v. Wilburton Bd. of Educ.*, 611 P.2d 239 (Okla. 1980); *James v. Southeastern Pa. Transp. Auth.*, 477 A.2d 1302 (Pa. 1984); *Budahl v. Gordon and David Assoc.*, 287 N.W.2d 489 (S.D. 1980); *City of Waco v. Landingham*, 157 S.W.2d 631 (Tex. 1941); *Sears v. Southworth*, 563 P.2d 192 (Utah 1977). We agree with the conclusion reached by these courts.

¶19 One reason for upholding increased protection of governmental entities through shorter notice of claim or statute of limitations periods is that the number of claims against governmental entities is significantly greater than against individual private tortfeasors. *See generally* Dennis P. Blackhurst, *Governmental Immunity in Arizona – The Stone Case*, 6 ARIZ. L. REV. 102, 107-08 (1964). Governments engage in a much greater range of activities than most private defendants, and must continue these activities despite the risk involved. *Newlan*, 535 P.2d at 1352; *Johnson*, 628 A.2d at 167. As noted by the court in *Budahl*:

> [T]here are real and vital differences between the situations of governmental units and of private parties as potential tort defendants. . . . [N]o private party has a tort responsibility comparable to the governmental unit's responsibility for injuries allegedly caused by defective or unsafe – conditions of highways. . . . Taking into account the extent of the governmental

> unit's liability exposure where public ways and public buildings are concerned, and of the difficulties of keeping in current touch with all those conditions that might become a source of liability, surely there is nothing constitutionally unreasonable about a notice requirement that is not applicable to other tortfeasors and other claimants.

287 N.W.2d at 492-93 (quoting Luke Cooperrider, *The Court, The Legislature, and Governmental Tort Liability in Michigan*, 72 MICH. L. REV. 187, 272 (1973)). We believe the one-year statute of limitations of A.R.S. section 12-821 is rationally related to the purpose of enabling the state to respond to and resolve actions against it in a timely manner, given its vast responsibility for acts of its employees and conditions in and on its far-ranging operations, properties, buildings, and roadways.

¶20 Other reasons for the legislature to require that actions against the state be filed no later than a year after an action accrues are (1) to foster prompt investigations and discovery while the evidence is still fresh; (2) to encourage repair of any dangerous conditions; (3) to enable prompt settlement of meritorious claims; and (4) to allow fiscal planning to prepare for any possible liability. *See Reirdon*, 611 P.2d at 240. These reasons provide rational grounds for adopting a shorter statute of limitations period for claims against the state than for claims against private tortfeasors. Accordingly, A.R.S. section 12-821 as applied to the Pikes does not violate equal protection concerns.

B. Effect of the Referendum on A.R.S. Section 12-821

¶21 For their second issue, the Pikes argue that the 1993 version of A.R.S. section 12-821 (which was applied in their case) was submitted to Arizona citizens by referendum and was rejected by the voters in the November 1994 election as part of Proposition 301. ADOT argues that the 1993 version of section 12-821 was not included in Proposition 301, but the Pikes assert that the text of Proposition 301 indicates otherwise.[4]

¶22 We agree with the Pikes that the text of the title of Proposition 301 might lead the reader to believe that the changes to A.R.S. section 12-821 were among the measures submitted to voters in the referendum. However, several facts show that section 12-821 was not among the statutes affected by the referendum.

---

[4] The lengthy text of the "official title" of Proposition 301 as it appeared on the ballot and in the Proclamation from the 1994 General Election included the following language:

> Ordering the submission to the people of an act amending Sections 9-500.02 and 12-550. Arizona Revised Statutes; . . . amending Section 12-820.02, Arizona Revised Statutes; *repealing Sections 12-820.03 and 12-821, Arizona Revised Statutes; amending Title 12, Chapter 7, Article 2, Arizona Revised Statutes, by adding a new Section 12-821;* amending Section 12-822, Arizona Revised Statutes; . . . changing the designation of Title 33, Chapter 12, Arizona Revised Statutes, to "Liabilities and Duties on Property Used for Education and Recreation;" amending Section 48-818, Arizona Revised Statutes; relating to tort reform. (Emphasis added.)

¶23 The proposition text is, as it indicates, merely the entire official title of the tort reform act passed by the legislature in 1993 as Senate Bill 1055. *See* Laws 1993, Ch. 90. The referendum and the publicity pamphlet indicate that some of the sections of Senate Bill 1055 were not referred to the ballot. Among those sections are sections 7 and 8, which repealed A.R.S. section 12-821 and added a new section 12-821. *See* STATE OF ARIZ. 1994 BALLOT PROPOSITIONS PUBLICITY PAMPHLET 95-96 (showing sections 7 and 8 shaded and explaining that shaded sections "were *not* referred to the ballot"); *see also Ward v. Stevens*, 86 Ariz. 222, 229, 344 P.2d 491, 495 (1959) (information in publicity pamphlet is "entitled to some weight" when determining meaning and purpose of constitutional amendment).

¶24 That the 1993 version of A.R.S. section 12-821, as well as other sections of the 1993 tort reform act, was excluded from the referendum is confirmed by referring to the 1994 volume containing A.R.S. sections 12-1101 to -2703. Statutes such as A.R.S. sections 12-2505 and -2506 note that changes made in the statutes by Laws 1993, Chapter 90, are subject to a 1994 general election ballot referendum, and they do not show an effective date for the changes because the timely filing of a referendum petition prevents the referred law from taking effect. *See Direct Sellers Ass'n v. McBrayer*, 109 Ariz. 3, 5, 503 P.2d 951, 953 (1972). The 1996 pocket part to the volume notes that purported amendments of sections 12-2505 and -2506 were rejected by voters in the 1994 general election ballot referendum.

¶25 On the other hand, no such notation for A.R.S. section 12-821 exists. The current version of this statute shows that it was added by Laws 1993, Chapter 90,

section 8, and Laws 1994, Chapter 162, section 1. Thus, the annotated statutes confirm that section 12-821 was not subject to the 1994 referendum and that it took effect in July 1993. Accordingly, the one-year statute of limitations applied to the Pikes' action against ADOT.

C. The Dissent

¶26 In our view the dissent overlooks two important points. One, *Stone* expressly abolished the defense of sovereign immunity. 93 Ariz. at 393, 381 P.2d at 113. If no such defense had existed, there would have been no need for the supreme court to expressly abolish it. Two, under the dissent's analysis, statutes such as A.R.S. sections 12-820.01 (absolute immunity for judicial and legislative functions and for administrative functions involving the determination of fundamental governmental policy); -820.02 (bestowing qualified immunity for public employees for nine different governmental functions); and -820.04 (no public agency or public employee can be liable for punitive damages) are unconstitutional because they abrogate the right to sue for injuries. Such a sweeping rule is not the law in Arizona. *See Evenstad*, 178 Ariz. at 586, 875 P.2d at 817.

¶27 The dissent also argues that the notice of claims statute, A.R.S. section 12-821.01, protects the state. This is not a persuasive argument for holding the statute unconstitutional. It is persuasive in that it is right – the statute does protect the state. First, the statute contains its own limitations period, which the dissent does not discuss. Section 12-821.01 bars an action if a notice of claim is not filed within 180 days of accrual of the cause of action.

Thus, section 12-821 extends the time to file an action, assuming a claim was filed first. Second, while a notice of claims statute does give the state early warning of problems that may be subject to immediate repair, it does not provide the detailed notification a lawsuit does about complex liability situations. The one-year statute of limitations in section 12-821 clearly serves a rational purpose by permitting the state an opportunity to budget for any settlements or potential judgments. *See* A.R.S. § 41-622(D); *State Dep't of Admin. Risk Mgt. v. University Physicians*, 182 Ariz. 262, 266, 895 P.2d 1025, 1029 (App. 1994) ("[T]he state insurance program is funded on an annual basis.").

¶28 Finally, the dissent contends that upholding the constitutionality of section 12-821 resurrects sovereign immunity. This is wrong. Sovereign immunity means not only freedom from liability but also freedom from suit. Statutes of limitations, on the other hand, not only do not preclude an injured person from bringing a lawsuit, but also the time periods are subject to such doctrines as waiver, estoppel, the discovery rule, and tolling. *See, e.g., Pritchard*, 163 Ariz. at 432, 788, P.2d at 1183. Thus, far from immunizing the state from suit, section 12-821 merely requires that an action against it be brought within one year of accrual.

CONCLUSION

¶29 In summary, we hold that the one-year statute of limitations contained in A.R.S. section 12-821 does not violate equal protection and thus is constitutional. We also conclude that the 1993 version of section 12-821 was

not subject to referendum and did apply to the Pikes' cause of action against ADOT. Therefore, we affirm the trial court judgment in favor of ADOT and Semm.

/s/ Michael D. Ryan
MICHAEL D. RYAN, Judge

CONCURRING:

/s/ Philip E. Toci
PHILIP E. TOCI, Judge

GRANT, J., dissenting.

¶30 I respectfully dissent from the majority decision. I believe that A.R.S. section 12-821 is unconstitutional because it violates the right to equal protection guaranteed by both the United States and Arizona Constitutions. The statute of limitations contained in A.R.S. section 12-821 applies to defendants who are governmental entities and employees and, for those defendants, reduces the normal tort statute of limitations from two years to one year. *See* A.R.S. section 12-542 (1992). Therefore, plaintiffs who have tort claims against governmental entities suffer a curtailed right to bring claims, while plaintiffs who have claims against all other defendants do not.

¶31 I agree with the majority that the constitutional right to bring an action to recover damages for injury guaranteed by Arizona Constitution, article 18, section 6, is subject to a reasonable statute of limitations. However, nothing in the constitutional provision exempts suits against governmental entities:

> The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

Our supreme court has decreed that this is a specific and strong requirement. *Kenyon v. Hammer,* 142 Ariz. 69, 74, 688 P.2d 961, 966 (1984). The majority discusses the nature of discriminatory classification and the type of state interest affected by the statute, holding that, under strict scrutiny, a discriminatory statute is valid only if it serves a "compelling state interest." The majority also states that "[t]he history of the sovereign immunity doctrine and case law developments lead us to conclude that the constitutional right to recover for injuries does not include a fundamental right to sue the state for negligence." Slip op. ¶ 14. That statement is erroneous.

¶32 The majority premises its conclusion on its belief that a right of action against the State was not recognized at common law when the Arizona Constitution was adopted, and that the common law doctrine of sovereign immunity served to shield governmental entities from tort liability. *See Sharp,* 21 Ariz. at 426, 189 P. at 631. The majority continues its analysis by stating, "The doctrine, which originated in eighteenth century England, was first applied in the United States in Massachusetts in 1812." That doctrine was known in England as "the King can do no wrong." However, the people who founded this country were seeking relief and freedom from the tyrannical power of English monarchs. Therefore, I do not believe our founding fathers had any intention to perpetuate sovereign immunity, nor was there a sovereign to enjoy that immunity. Rather, in the United States, the people are

sovereign. There appears to have been a misinterpretation of early American case law which unfortunately has been perpetuated.

¶33 Furthermore, the Arizona Constitution clearly did not intend to perpetuate this misinterpretation, for it stated unequivocally that there would be **NO** abrogation of the right to sue for injuries. The Arizona Constitution did not limit this right by adding the words "except against the State or its entities." I see no reason for this court to add such language judicially.

¶34 The majority cites *Mower v. Inhabitants of Leicester*, 9 Mass. 247 (1812) to support the existence of the common law doctrine of sovereign immunity. *Mower* is difficult to understand given the antiquated wording; however, it is a case in which a plaintiff brought an action against the town of Leicester for the loss of his horse due to the failure of the town to keep a certain bridge in repair. The *Mower* court held that a town is liable if negligence is proved; but, no negligence was charged in the case. The action was at common law, and the incorporated town would have been liable except that plaintiff sought double damages (apparently similar to punitive damages), which the court held would not lie unless allowed by statute. This was not a case for common law damages for negligence and, therefore, does not support the majority's proposition that sovereign immunity existed at common law when the Arizona Constitution was adopted.

¶35 Oddly, the majority ignores Arizona's own common law on the issue of sovereign immunity in *Ryan v. State*, 134 Ariz. 308, 656 P.2d 597 (1982). The Arizona Supreme Court held:

We are well aware that some of the inconsistencies in our previous opinions in this area of law have made the task of the lower courts more difficult. A full resolution of the many questions in a broad sweeping opinion is also fraught with danger. However, a return to *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963), would make a good starting point. The Court in that opinion said:

> *"[T]he substantive defense of governmental immunity is now abolished not only for the instant case, but for all other pending cases,* those not yet filed which are not barred by the statute of limitations and all future causes of action. All previous decisions to the contrary are overruled.["]
>
> "There is perhaps no doctrine more firmly established than the principle that liability follows tortious wrongdoing; that where negligence is the proximate cause of injury, the rule is liability and immunity is the exception. . . . "

93 Ariz. at 393, 381 P.2d at 107 [emphasis added].

It can be said that in subsequent cases we have not always been true to the spirit of the Stone decision that *"the rule is liability and immunity is the exception."* (Emphasis added in *Ryan*.)

134 Ariz. at 309, 656 P.2d at 598.

¶36 The *Ryan* court went on to hold that sound public policy requires public officers and employees to be held accountable for their negligent acts in the performance of their official duties. "Thus the parameters of duty owed by the state will ordinarily be coextensive with those

owed by others." *Ryan*, 134 Ariz. at 310, 656 P.2d at 599. The majority thus appears to be making an end run around *Ryan* as well as attempting to resurrect sovereign immunity – if, indeed, it ever was a living doctrine in Arizona at all.

¶37 The Notice of Claim Statute, A.R.S. section 12-821.01, affords the State ample fiscal protection. The State does not need additional protection in the form of a shortened statute of limitations. It will receive notice, within 180 days after the cause of action accrues, that the claim exists and of the general amount of damages requested. The Notice of Claim Statute thus allows the State to pay or settle claims early and avoid legal expenses, or to begin its investigation and preparation for litigation. If the plaintiff fails to comply with A.R.S. section 12-821.01, plaintiff is barred from bringing an action against the State or public entity. *Crum v. Superior Court*, 186 Ariz. 351, 353, 922 P.2d 316, 318 (App. 1996).

¶38 I find no valid reason, therefore, to shorten the statute of limitations in those cases brought against the State or its agent. This is merely an attempt to reach the non-existent doctrine of sovereign immunity by another path.

¶39 I would hold A.R.S. section 12-821 unconstitutional as violative of equal protection. I would reverse the summary judgment in favor of ADOT and Semm and remand this case for trial on the merits.

/s/ Sarah D. Grant
SARAH D. GRANT, Presiding Judge

APPENDIX C

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

KIRK D. PIKE and MARY IRENE PIKE, Plaintiffs-Appellants, v. ARIZONA DEPARTMENT OF TRANSPORTATION; DAVID RAY SEMM and JANE DOE SEMM, husband and wife, Defendants-Appellees.	1 CA-CV 96-0443 DEPARTMENT A MARICOPA County Superior Court No. CV 95-10616 ORDER (Filed Feb. 10, 1998)

IT IS ORDERED directing the Clerk of the Court of Appeals to substitute the following paragraph in its entirety for paragraph 27 on pages 14-15 in the slip opinion filed with this court on January 29, 1998.

¶ 27 The dissent also argues that the notice of claims statute, A.R.S. section 12-821.01, protects the state. This is not a persuasive argument for holding section 12-821 unconstitutional. It is persuasive in that it is right – section 12-821.01 does protect the state. First, it contains its own limitations period, which the dissent does not criticize. Section 12-821.01 bars an action if a notice of claim is not filed within 180 days of accrual of the cause of action. Thus, section 12-821 extends the time to file an action, assuming a claim was filed first. Second, a notice

of claims statute gives the state early warning of problems that may be subject to immediate repair, although it does not provide the detailed notification a lawsuit does about complex liability situations. The one-year statute of limitations in section 12-821 serves a rational purpose by permitting the state an opportunity to budget for any settlements or potential judgments. *See* A.R.S. § 41-622(D); *State Dep't of Admin. Risk Mgt. v. University Physicians*, 182 Ariz. 262, 266, 895 P.2d 1025, 1029 (App. 1994) ("[T]he state insurance program is funded on an annual basis.").

IT IS FURTHER ORDERED that the copies of this order be distributed to all persons who received copies of the original opinion.

DATED this 10th day of February, 1998.

/s/ Michael D. Ryan
Michael D. Ryan, Judge

APPENDIX D

§ 12-542. Injury to person; injury when death ensues; Injury to property; conversion of property; forcible entry and forcible detainer; two year limitation

Except as provided in § 12-551 there shall be commenced and prosecuted within two years after the cause of action accrues, and not afterward, the following actions:

1. For injuries done to the person of another including causes of action for medical malpractice as defined in § 12-561.

2. For injuries done to the person of another when death ensures from such injuries, which action shall be considered as accruing at the death of the party injured.

3. For trespass for injury done to the estate or the property of another.

4. For taking or carrying away the goods and chattels of another.

5. For detaining the personal property of another and for converting such property to one's own use.

6. For forcible entry or forcible detainer, which action shall be considered as accruing at the commencement of the forcible entry or detainer. Amended by Laws 1971, Ch. 175, § 1; Laws 1976, 1st S.S., Ch. 1, § 3, eff. Feb. 27, 1976; Laws 1978, Ch. 19, § 1; Laws 1985, Ch. 84, § 1.

APPENDIX E

§ 12-821. General limitation; public employee

All actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward.

Added by Laws 1993, Ch. 90, § 8; Laws 1994, Ch. 162, § 1.

APPENDIX F

§ 12-821.01. Authorization of claim against public entity or public employee

A. Persons who have claims against a public entity or a public employee shall file claims with the person or persons authorized to accept service for the public entity or public employee as yet forth in the Arizona rules of civil procedure within one hundred eighty days after the cause of action accrues. The claim shall contain facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed. The claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount. Any claim which is not filed within one hundred eighty days after the cause of action accrues is barred and no action may be maintained thereon.

B. For purposes of this section, a cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage.

C. Notwithstanding subsection A, any claim which must be submitted to a binding or nonbinding dispute resolution process or an administrative claims process or review process pursuant to a statute, ordinance, resolution, administrative or governmental rule or regulation, or contractual term shall not accrue for the purposes of this section until all such procedures, processes or remedies have been exhausted. The time in which to give notice of a potential claim and to sue on the claim shall run from the date on which a final decision or notice of

disposition is issued in an alternative dispute resolution procedure, administrative claim or review process. This provision shall not be construed to prevent the parties to any contract from agreeing to extend the time for filing such notice of claim.

D. Notwithstanding subsection A, a minor or an insane or incompetent person may file a claim within one hundred eighty days after the disability ceases.

E. A claim against a public entity or public employee filed pursuant to this section is deemed denied sixty days after the filing of the claim unless the claimant is advised of the denial in writing before the expiration of sixty days.

F. This section shall apply to all causes of action which accrue on or after the effective date of this section.

Added by Laws 1994, Ch. 162, § 2.

APPENDIX G

§ 12-821. Authorization of claim against public entity or public employee; definition

A. Persons who have claims against a public entity or public employee shall file such claims in the same manner as that prescribed in the Arizona Rules of Civil Procedure, Rule 4(D) within twelve months after the cause of action accrues. Any claim which is not filed within twelve months after the cause of action accrues is barred and no action may be maintained except upon a showing of excusable neglect if the action is brought within the otherwise applicable period of limitations, provided that if there is no excusable neglect, and if the absence of excusable neglect is because of the conduct of the claimant's attorney, then the action shall proceed, and the public entity and public employee shall have a right of indemnity against the claimant's attorney for any liability assessed in the action.

B. Notwithstanding subsection A, a minor or an insane or incompetent person may file a claim within twelve months after the disability ceases.

C. A claim against a public entity or public employee filed pursuant to this section is deemed denied sixty days after the filing of the claim unless the claimant is advised of the denial in writing before the expiration of sixty days.

D. A claim for medical malpractice under chapter 5.1, article 1 of this title[1] is excluded from the provisions

---

[1] Section 12-561 et seq.

of this section as no claim is necessary to bring a medical malpractice action.

E. For the purposes of this section "excusable neglect" means reasonable and foreseeable neglect or inadvertence.

Added by Laws 1984, Ch. 285, § 5.

APPENDIX H

BALLOT FORMAT

PROPOSITION 301

REFERENDUM ORDERED BY PETITION OF THE PEOPLE

OFFICIAL TITLE

ORDERING THE SUBMISSION TO THE PEOPLE OF AN ACT AMENDING SECTIONS 9-500.02 AND 12550, ARIZONA REVISED STATUTES; AMENDING TITLE 12, CHAPTER 6, ARIZONA REVISED STATUTES, BY ADDING ARTICLE 12; TRANSFERRING AND RENUMBERING SECTION 12-565, ARIZONA REVISED STATUTES, FOR PLACEMENT IN TITLE 12, CHAPTER 6, ARTICLE 12, ARIZONA REVISED STATUTES, AS SECTION 12-713; AMENDING SECTION 12-713, ARIZONA REVISED STATUTES, AS TRANSFERRED AND RENUMBERED; AMENDING TITLE 12, CHAPTER 6, ARTICLE 12, ARIZONA REVISED STATUTES, AS ADDED BY SECTION 3 OF THIS ACT, BY ADDING SECTIONS 12-714 AND 12-715; AMENDING SECTION 12-820.02, ARIZONA REVISED STATUTES; REPEALING SECTIONS 12-820.03 AND 12-821, ARIZONA REVISED STATUTES; AMENDING TITLE 12, CHAPTER 7, ARTICLE 2, ARIZONA REVISED STATUTES, BY ADDING A NEW SECTION 12-821; AMENDING SECTION 12-822, ARIZONA REVISED STATUTES; AMENDING TITLE 12, CHAPTER 7, ARIZONA REVISED STATUTES, BY ADDING ARTICLE 11; AMENDING SECTIONS 12-2505 AND 12-2506, ARIZONA REVISED STATUTES; AMENDING TITLE 12, ARIZONA REVISED STATUTES, BY ADDING CHAPTER 17; TRANSFERRING AND RENUMBERING TITLE 12,

CHAPTER 5.1, ARTICLE 2, ARIZONA REVISED STATUTES, AS TITLE 12, CHAPTER 17, ARTICLE 1, ARIZONA REVISED STATUTES; TRANSFERRING AND RENUMBERING EXISTING SECTIONS 12-581 THROUGH 12-594, RESPECTIVELY, AS SECTIONS 12-2601 THROUGH 12-2614; REPEALING THE ARTICLE HEADING OF FORMER TITLE 12, CHAPTER 5.1, ARTICLE 2, ARIZONA REVISED STATUTES; AMENDING SECTIONS 12-2602, 12-2605, 12-2606, 12-2607, 12-2609, 12-2610, 12-2612 AND 12-2613, ARIZONA REVISED STATUTES, AS TRANSFERRED AND RENUMBERED; AMENDING SECTION 33-1551, ARIZONA REVISED STATUTES; CHANGING THE DESIGNATION OF TITLE 33, CHAPTER 12, ARIZONA REVISED STATUTES, TO "LIABILITIES AND DUTIES ON PROPERTY USED FOR EDUCATION AND RECREATION"; AMENDING SECTION 48-818, ARIZONA REVISED STATUTES; RELATING TO TORT REFORM.

DESCRIPTIVE TITLE

AN ACT IMPOSING A TIME LIMIT FOR FILING CERTAIN LAWSUITS; CHANGING THE COLLATERAL SOURCE RULE; CREATING INSURER RIGHTS OF RECOVERY; CREATING GOVERNMENTAL AND OTHER IMMUNITIES; PERMITTING CERTAIN DEFENSES THAT BAR RECOVERY; PROVIDING PERIODIC PAYMENT OF DAMAGES FOR FUTURE LOSSES.

PROPOSITION 301

A "yes" vote shall have the effect of approving the Legislature's changes to Arizona's civil justice system.

YES ➜

A "no" vote shall have the effect of not approving the Legislature's changes to Arizona's civil justice system.

NO ➜

APPENDIX I

PROCLAMATION
GENERAL ELECTION 1994

WHEREAS, the returns of the General Election held on the first Tuesday after the first Monday in November, 1994, have been canvassed and certified by the Canvassing board on the 23rd day of November, 1994, in accordance with Article IV, Part I, of the Constitution of the State of Arizona, and Sections 16-651 and 19-126 of the Arizona Revised Statutes; and

WHEREAS, nine referred and initiated measures were voted upon by registered electors, four of which were Amendments to the Constitution of Arizona; and

WHEREAS, the whole number of votes cast for and against each proposed measure was as follows:

PROPOSITION 100 A concurrent resolution proposing an amendment to the Constitution of Arizona; amending Article IV, Part 2, Section 5, Constitution of Arizona, amending Article V, Section 1, Constitution of Arizona, as amended by Proposition 107, an initiative measure enacted in 1992; repealing Article V, Section 1, Constitution of Arizona, as amended by Proposition 100, as enacted by Laws 1991, H.C.R. 2001; amending Article V, Sections 6, 8 and 9, Constitution of Arizona; relating to the executive department.

YES	376,336
NO	705,766

PROPOSITION 101 A concurrent resolution proposing an amendment to the Constitution of Arizona; amending Article X, Constitution of Arizona, by adding section 12; relating to state lands.

YES 432,616

NO 630,955

PROPOSITION 102 A concurrent resolution proposing an amendment to the Constitution of Arizona; amending Article IX, Section 13, Constitution of Arizona; relating to property tax exemption.

YES 552,028

NO 515,611

PROPOSITION 103 Proposing an amendment to the Constitution of Arizona; amending Article II, Section 31, Constitution of Arizona; amending Article XVIII, Section 5, Constitution of Arizona; amending Article XVIII, Section 6, Constitution of Arizona, relating to civil justice reform.

YES 431,846

NO 663,313

PROPOSITION 200 Amending Title 42, Chapter 7, Arizona Revised Statutes, by adding Articles 1.2 and 1.3; relating to tobacco taxes to provide for health care services for the medically needy, medically indigent and low income children, tobacco related education and research and adjustment to corrections fund, use of tax

monies to supplement existing funds and levels of services, tobacco tax levy on Indian Reservations and related exemptions; and providing for severability.

YES 565,094

NO 547,189

PROPOSITION 201 Relating to Game and Fish: Defining unlawful methods of taking wildlife; and adding section 17-301(D) to Arizona Revised Statutes to define lawful methods of taking or handling wildlife, specifically banning certain devices, allowing the use of firearms and implements in hand and allowing certain taking and relocation methods and devices.

YES 635,277

NO 450,581

PROPOSITION 300 Ordering the submission to the people of an act amending Title 37, Chapter 2, Arizona Revised Statutes, by adding Articles 2.1; amending Sections 37-231 and 37-604, Arizona Revised Statutes; amending Title 37, Chapter 2, Article 3, Arizona Revised Statutes, by adding Section37-261; relating to state lands.

YES 412,585

NO 614,626

PROPOSITION 301

Ordering the submission to the people of an act amending Sections 9-500.02 and 12-550, Arizona Revised Statutes; amending Title 12, Chapter 6, Arizona Revised Statutes, by adding Article 12; transferring and renumbering Section 12-565, Arizona Revised Statutes, for placement in Title 12, Chapter 6, Article 12, Arizona Revised Statutes, as Section 12-713; amending Section 12-713, Arizona Revised Statutes, as transferred and renumbered; amending Title 12, Chapter 6, Article 12, Arizona Revised Statutes, as added by Section 3 of this Act, by adding Sections 12-714 and 12-715; amending Section 12-820.02, Arizona Revised Statutes; repealing Sections 12-820.03 and 12-821, Arizona Revised Statutes; amending Title 12, Chapter 7, Article 2, Arizona Revised Statutes, by adding a new Section 12-821; amending Section 12-822, Arizona Revised Statutes; amending Title 12, Chapter 7, Arizona Revised Statutes, by adding Article 11; amending Sections 12-2505 and 12-2506, Arizona Revised Statutes; amending Title 12, Arizona Revised Statutes, by adding Chapter 17; transferring and renumbering Title 12, Chapter 5.1, Article 2, Arizona Revised Statutes, as Title 12, Chapter 17, Article 1,

Arizona Revised Statutes; transferring and renumbering existing Sections 12-581 through 12-594, respectively, as Sections 12-2601 through 12-2614; repealing the Article heading of former Title 12, Chapter 5.1, Article 2, Arizona Revised Statutes; amending Sections 12-2602, 12-2605, 12-2606, 12-2607, 12-2609, 12-2610, 12-2612 and 12-2613, Arizona Revised Statutes, as transferred and renumbered; amending Section 33-1551, Arizona Revised Statutes; changing the designation of Title 33, Chapter 12, Arizona Revised Statutes, to "Liabilities and Duties on Property Used for Education and Recreation;" amending Section 48-818, Arizona Revised Statutes; relating to tort reform.

YES 404,231

NO 656,407

PROPOSITION 302 Recommendation of the commission on salaries for elected state officers as to legislative salaries have been certified to the Secretary of State and hereby are submitted to the qualified electors for their approval or rejection.

YES 428,324

NO 655,174

NOW THEREFORE, I, Fife Symington, Governor of the State of Arizona, do hereby declare the statutory measures proposed to the voters in the form of Propositions 102, 200, 201, which were approved by a majority of those voting thereon at said General Election of the State of Arizona, to be law.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Arizona.

/s/ Fife Symington
GOVERNOR

DONE at the Capitol in Phoenix on this twenty-eighth day of November in the Year of Our Lord One Thousand Nine Hundred and Ninety-four and of the Independence of the United States of America the Two Hundred and Eighteenth.

ATTEST:

Secretary of State

/s/ Richard Mahoney

[SEAL]

APPENDIX J

IN THE
Supreme Court
OF THE
STATE OF ARIZONA

KIRK D. PIKE and MARY IRENE PIKE *Plaintiffs-Appellants,* vs. ARIZONA DEPARTMENT OF TRANSPORTATION; DAVID RAY SEMM and JANE DOE SEMM, husband and wife, *Defendants-Appellees.*	NO. CV-98-0149-PR Court of Appeals NO. 1 CA CV 96-0443 Maricopa County Superior Court NO. CV 95-10616

BRIEF OF *AMICUS CURIAE*, JAMES AND MINERVA HIGHTOWER

In support of the Petition for Review

ARNETT & ARNETT P.C.
ATTORNEYS AT LAW BROTHERS IN FACT
4600 SOUTH MILL AVENUE • SUITE 280
TEMPE, ARIZONA 85282
(602) 839-4600
Wayne C. Arnett (4030)
Mark W. Arnett (11375)
Attorneys for *Amicus Curiae*, JAMES AND MINERVA HIGHTOWER

TABLE OF CONTENTS

TABLE OF CITATIONS iii

ARGUMENT 1

I. INTRODUCTION 1

II. REASONS FOR GRANTING THE PETITION FOR REVIEW 2

III. THE SPECIAL ONE-YEAR STATUTE OF LIMITATIONS FOR THE STATE AND ITS POLITICAL SUBDIVISIONS IS UNCONSTITUTIONAL 3

A. INTRODUCTION 3

B. A.R.S. § 12-821 VIOLATES THE ARIZONA CONSTITUTION, ARTICLE IV, PART 2, § 19, IN THAT IT IS A SPECIAL LAW GRANTING THE STATE A SPECIAL STATUTE OF LIMITATIONS 4

C. A.R.S. § 12-821 VIOLATES ARTICLE 2, § 13 OF THE ARIZONA CONSTITUTION (THE EQUAL PROTECTION CLAUSE) 8

1. Standard of Review 9

2. A.R.S. § 12-821 violates Article 2, § 13 of the Arizona Constitution (the Equal Protection Clause) 13

3. Article 4, Part 2, § 18 of the Arizona Constitution does not grant permission for the legislature to grant the state a special statute of limitations 16

CONCLUSION 22

TABLE OF CITATIONS

CASES

Arizona Center For Law In Public Interest v. Hassell, 172 Ariz. 356, 837 P.2d 158 (Ct. App. 1991) 4

Arizona Downs v. Arizona Horsemen's Foundation, 130 Ariz. 550, 637 P.2d 1053 (1981) 5

Arizona Eastern R. Co. V. Head, 26 Ariz. 259 224 P. 1067 (1924) 5

Boswell v. Phoenix Newspapers, Inc., 152 Ariz. 9, 730 P.2d 186 (1986) 8

City of Glendale v. Farmers Ins. Exchange, 126 Ariz. 118, 613 P.2d 278 (1980) 17

City of Prescott ex rel. Lodge v. O'Sullivan, 46 Ariz. 551, 53 P.2d 69 (1935) 5

Elliott v. State, 29 Ariz. 389, 242 P. 340 (1926) 5

Graham County v. Dowell, 50 Ariz. 221, 71 P.2d 1019 (1937) 5

Hernandez v. Frohmiller, 68 Ariz. 242, 204 P.2d 854 (1949) 5

Kenyon v. Hammer, 143 Ariz. 69, 688 P.2d 961 (1984) 7, 10, 11

Lerma v. Keck, 186 Ariz. 228, 921 P.2d 28 (Ct. App. 1996) 4, 5

Phoenix Newspapers, Inc. v. Purcell, 187 Ariz. 74, 927 P.2d 340 (Ct. App. 1996), *reconsideration denied, review granted in part, denied in part, review dismissed*, 188 Ariz. 257, 934 P.2d 1349 4

Pirtchard v. State of Arizona, 163 Ariz. 427, 788 P.2d 1178 (1990) 9

Prescott Courier, Inc. v. Moore, 35 Ariz. 26, 274 P. 163 (1929) 5, 6

State ex rel. Corbin v. Pickrell, 136 Ariz. 589, 667 P.2d 1304 (1983) 3

State v. Childs, 32 Ariz. 222, 257 P. 366, 54 A.L.R. 736 (1927) 6

State v. Levy's, 119 Ariz. 191, 580 P.2d 329 (1978) ... 4, 5

State v. Sharp, 21 Ariz. 424, 189 P. 631 (1920) 9

State v. Superior Court, 123 Ariz. 324, 599 P.2d 777 (1979) 2

Stewart v. Robertson, 45 Ariz. 143, 40 P.2d 979 (1935) 6

Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963) 9

Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712 (1985) 3

Tucson Elec. Power Co. v. Apache County, 185 Ariz. 5, 912 P.2d 9 (Ct. App. 1995) 4

White v. State, 661 P.2d 1272 (Mont. 1983) 7, 10

CONSTITUTIONAL PROVISIONS

Arizona Constitution, Article II, § 13 .... 1, 3, 7, 10, 17, 18

Arizona Constitution, Article IV, Part 2, § 18 ... 13, 14, 17

Arizona Constitution, Article IV, Part 2, § 19 ... 1, 3, 4, 18

Arizona Constitution, Article XII § 7 16

Arizona Constitution, Article XIII § 7 16

Arizona Constitution, Article XVIII § 6 8

Montana Constitution, Article II, § 16 7

STATUTES

A.R.S. § 2-321 16
A.R.S. § 12-401(15) & (16) 13
A.R.S. § 12-542 14
A.R.S. § 12-548 14
A.R.S. § 12-820(6) 3, 16
A.R.S. § 12-821 ... 1, 2, 3, 6, 7, 9, 10, 12, 13, 14, 16, 17, 18
A.R.S. § 12-822 13
A.R.S. § 23-986(A) 11
A.R.S. § 35-468 16
A.R.S. § 35-511(2) 16
A.R.S. § 38-382(3) 16
A.R.S. § 38-701(4) 16
A.R.S. § 41-563(E)(3) 16
A.R.S. § 49-581(14) 16
A.R.S. § 49-1001(12) 16

ARGUMENT

I. INTRODUCTION.

The Pikes have challenged the constitutionality of A.R.S. § 12-821, claiming that it violates the equal protection clauses of both the Arizona Constitution (Article 2, § 13) and the U.S. Constitution. This brief agrees with that assertion and makes additional arguments in support of the equal protection analysis.

However, there is another provision of the Arizona Constitution that is violated by A.R.S. § 12-821. The Arizona Legislature does not have the power to pass special

legislation granting a special statute of limitations (Article IV, Part 2, § 19). This provision of the Arizona Constitution has not been raised by the Pikes, yet should be considered in ruling on the constitutionality of A.R.S. § 12-821.

With respect to Article IV, Part 2, § 19 (Legislature does not have the power to pass special legislation granting a special statute of limitations), it doesn't matter whether there is a fundamental right (and therefore a strict scrutiny analysis) or not. If the legislature has done what it is specifically prohibited from doing by the Arizona Constitution, the legislation should be struck down, irrespective of whether there is a rational basis or strict scrutiny. The whole issue of whether there is a fundamental right to sue and what test to apply is only relevant to the equal protection argument.

We will present argument on the new provision of the Arizona Constitution first, followed by additional arguments on the equal protection issue.

II. REASONS FOR GRANTING THE PETITION FOR REVIEW.

The issue of whether the special one-year statute of limitations for the state and its political subdivisions is constitutional is one of great concern to litigants throughout the state.

Where there are several pending cases in the lower courts which present the same issue, normal appellate procedures will result in unnecessary cost and delay to all

litigants. *See, State v. Superior Court,* 123 Ariz. 324, 329-30, 599 P.2d 777, 782-83 (1979).

James and Minerva Hightower are the plaintiffs in a lawsuit for catastrophic injuries sustained by Mr. Hightower while attending the Coconino County Fair on September 2, 1993. A steer got loose from a 4-H Club exhibit at the fair and kicked Mr. Hightower into the tailgate of a pickup truck, causing him to strike his head. Mr. Hightower was rendered a quadriplegic as a result of his injuries. The Hightowers made a timely claim against Coconino County, but did not file suit until shortly before the two-year anniversary of the injury. Both Coconino County and the 4-H Club got the case dismissed on the basis of the special one-year statute of limitations applicable to the state and its political subdivisions, A.R.S. § 12-821. The Hightowers argued that A.R.S. § 12-821 is unconstitutional.

The case was dismissed and the Hightowers took an appeal. The matter is presently pending in the Arizona Court of Appeals, Division One, with Cause No. 1 CA CV 97-0443 and Coconino County Superior Court No. CV 96-0032. The matter is set for oral argument on May 27, 1998 at 1:30 p.m.

The question presented is a clear issue of law with obvious statewide significance. The congruence of these factors militates in favor of accepting jurisdiction. *See, State ex rel. Corbin v. Pickrell,* 136 Ariz. 589, 591, 667 P.2d 1304, 1306 (1983). *Summerfield v. Superior Court,* 144 Ariz. 467, 698 P.2d 712 (1985).

III. THE SPECIAL ONE-YEAR STATUTE OF LIMITATIONS FOR THE STATE AND ITS POLITICAL SUBDIVISIONS IS UNCONSTITUTIONAL.

A. INTRODUCTION

A.R.S. § 12-821 provides a special, one-year statute of limitations for public entities and public employees. The language of the statute has undergone several changes over the years. The current statutory language is as follows:

> All actions against any public entity[1] or public employee shall be brought within one year after the cause of action accrues and not afterwards.

A.R.S. § 12-821.

However, the Arizona Legislature does not have the power to pass special legislation granting a special statute of limitations (Article IV, Part 2, § 19), or to give public entities preferential treatment over other tortfeasors (Article 2, § 13).

B. A.R.S. § 12-821 VIOLATES THE ARIZONA CONSTITUTION, ARTICLE IV, PART 2, § 19, IN THAT IT IS A SPECIAL LAW GRANTING THE STATE A SPECIAL STATUTE OF LIMITATIONS.

Article IV, Part 2, § 19, of the Arizona Constitution provides:

---

[1] A.R.S. § 12-820(6) defines "public entity:"

> "Public entity" includes this state and any political subdivision of this state.

> No local or special laws shall be enacted in any of the following cases, that is to say:
>
> * * *
>
> 6. Limitation of civil actions. . . .
>
> * * *
>
> 20. When a general law can be made applicable.

Because of this provision, the legislature may not enact local or special laws granting any special or exclusive privileges, immunities, or franchises. *Lerma v. Keck,* 186 Ariz. 228, 921 P.2d 28 (Ct. App. 1996).

The Arizona courts have developed a test to determine whether a law is special legislation violative of this provision. A law is not special legislation if: (1) it bears a rational relationship to a legitimate legislative objective; (2) the classification contained therein encompasses all members of the relevant class, similarly situated; and (3) the class is elastic, allowing members to move into and out of class to accommodate warranted inclusions and exclusions as circumstances change. *Phoenix Newspapers, Inc. v. Purcell,* 187 Ariz. 74, 927 P.2d 340 (Ct. App. 1996), *reconsideration denied, review granted in part, denied in part, review dismissed,* 188 Ariz. 257, 934 P.2d 1349; *Arizona Center For Law In Public Interest v. Hassell,* 172 Ariz. 356, 837 P.2d 158 (Ct. App. 1991).

Though special law analysis and equal protection analysis overlap in sharing the requirement that a statute must rationally further a legitimate state objective, a statute that does not violate equal protection may still be invalid as a special law. *State v. Levy's,* 119 Ariz. 191, 580

P.2d 329 (1978) (Law which provided as exemption for the transaction privilege tax on sales of less than $1,000 to Mexican residents within 30 miles of the Mexican border was not violative of the equal protection clause, but it was unconstitutional under Article IV, Part 2, § 19, prohibiting local or special laws.) *Tucson Elec. Power Co. v. Apache County*, 185 Ariz. 5, 912 P.2d 9 (Ct. App. 1995). The provision of this section prohibiting special privileges was intended to secure equality of opportunity to all persons similarly situated. *Prescott Courier, Inc. v. Moore*, 35 Ariz. 26, 274 P. 163 (1929).

The prohibitions of this section of the Arizona Constitution against special legislation serve a purpose distinguishable from equal protection provisions. Equal protection is denied when the state unreasonably discriminates against a person or class, whereas special legislation unreasonably and arbitrarily discriminates in favor of a person or class by granting them a special or exclusive immunity, privilege, or franchise. *Arizona Downs v. Arizona Horsemen's Foundation*, 130 Ariz. 550, 637 P.2d 1053 (1981). While the equal protection clause prohibits unreasonable discrimination against a particular class, the special legislation clause prohibits unreasonable discrimination in favor of a particular class. *Lerma v. Keck*, 186 Ariz. 228, 921 P.2d 28 (Ct. App. 1996)

This section has been used by the courts to invalidate a variety of laws. *Elliott v. State*, 29 Ariz. 389, 242 P. 340 (1926) (Sunday closing laws invalid because they grant special privileges); *Graham County v. Dowell*, 50 Ariz. 221, 71 P.2d 1019 (1937) (Law directing a certain highway in a certain county unconstitutional); *State v. Levy's*, 119 Ariz.

191, 580 P.2d 329 (1978) (Law which provided an exemption for the transaction privilege tax on sales of less than $1,000 to Mexican residents within 30 miles of the Mexican border was unconstitutional as a local or special law); *Arizona Eastern R. Co. V. Head,* 26 Ariz. 259 224 P. 1067 (1924) (Law providing for 12% interest on judgments against employers unconstitutional as a special law regulating the rate of interest on money); *City of Prescott ex rel. Lodge v. O'Sullivan,* 46 Ariz. 551, 53 P.2d 69 (1935) (Law which required city of Prescott to publish its ordinances three times instead of ten was unconstitutional as a special law); *Hernandez v. Frohmiller,* 68 Ariz. 242, 204 P.2d 854 (1949) (Law requiring one class of counties and only permitting another class of counties to establish a civil service system was unconstitutional, because a general law could be made applicable); *Stewart v. Robertson,* 45 Ariz. 143, 40 P.2d 979 (1935) (law that in reality grants monopoly to one class of persons was unconstitutional); *Prescott Courier, Inc. v. Moore,* 35 Ariz. 26, 274 P. 163 (1929) (Advertisement for bids for county printing which limited bids to newspapers qualified to publish legal notices was unconstitutional); *State v. Childs,* 32 Ariz. 222, 257 P. 366, 54 A.L.R. 736 (1927) (Law prohibiting sale of drugs in original packages or patent medicine except by registered pharmacist was unconstitutional);

No Arizona case has considered a special statute of limitations for one defendant (the state and its political subdivisions and employees) under this provision of the Constitution. But clearly the fact that the Constitution specifically includes "limitation of civil actions" among the subjects for which special legislation will not be permitted indicates the intent to prohibit exactly what the

legislature has done here. The legislature can enact statutes of limitation for different types of civil actions. But it cannot grant a special statute of limitations for one special defendant.

The Constitution specifically prohibits the legislature from passing a special statute of limitations "when a general law can be made applicable." Certainly the general two-year statute of limitations for tort claims can be made applicable to this case and every other case against the state for injuries caused by the negligence of the state.

A.R.S. § 12-821 is clearly a special law granting one very inelastic group of defendants a special statute of limitations. This is specifically prohibited by the Arizona Constitution and must be struck down.

C. A.R.S. § 12-821 VIOLATES ARTICLE 2, § 13 OF THE ARIZONA CONSTITUTION (THE EQUAL PROTECTION CLAUSE).

1. Standard of Review.

The majority in the Court of Appeals opinion ruled that the constitutional right to recover for injuries does not include a fundamental right to sue the state for negligence. It reached this conclusion because there was a period of time between 1920 and 1963 when Arizona recognized by judicial decree, a common law doctrine of sovereign immunity. This is contrary to the holding of the Arizona Supreme Court in *Kenyon v. Hammer,* 142 Ariz. 69, 688 P.2d 961 (1984). In that case the Arizona Supreme Court posed the question: IS THE RIGHT TO RECOVER DAMAGES FOR BODILY INJURY A FUNDAMENTAL

RIGHT? The court answered the question with a clear "YES." 142 Ariz. At 83, 688 P.2d 961 at 975. In doing so the court cited with approval the Montana Supreme Court's holding in *White v. State*, 661 P.2d 1272, 1275 (Mont. 1983):

> The Montana Supreme Court recently considered a statute which discriminated between ordinary tort claimants and those with claims against governmental entities. Noting that Article II, § 16 of the Montana Constitution guaranteed that all persons be given a "speedy remedy . . . for every injury of person, property or character," the court held that the right to recover tort damages was guaranteed by the constitution and was "fundamental." *White v. State*, 661 P.2d 1272, 1275 (Mont. 1983). Applying a strict scrutiny analysis, the court held that provisions of the statute which limited the compensible components of injury, including physical pain and suffering, violated the state's equal protection guarantee and were void.

142 Ariz. at 81, 688 P.2d at 973.

The majority in the present case found a distinction here. Although the court recognized that there is a fundamental right to sue for injuries, it wrongly held that there is no fundamental right to sue the state. However, as Judge Grant pointed out in the dissent, the constitutional right to sue for injuries does not contain an exception for the government. Slip Opinion ¶ 31.

Judge Grant is also correct in criticizing the majority for using the history of the doctrine of sovereign immunity to justify its conclusion that there is no fundamental right to sue the state for injuries. As this court stated in

Boswell v. Phoenix Newspapers, Inc., 152 Ariz. 9, 730 P.2d 186 (1986), the constitutional provisions are interpreted "by examining the text and, where necessary, history in an attempt to determine the framer's intent." 152 Ariz. at 12. As set forth below, Arizona courts have consistently held that those rights of action that have their roots in the common law at the time the Constitution was adopted are afforded constitutional protection. Conversely, those rights of action that are statutorily created after the adoption of the Arizona Constitution are not protected. The rationale behind this distinction makes sense. To allow every claim constitutional protection would mean that if the legislature ever created a cause of action, it would be powerless to later repeal its own laws. Therefore, Arizona courts have wisely limited the Arizona constitutional protection to actions whose roots are in common law.

However, no court in Arizona has ever held that the Constitution protects only the exact actions and remedies available in 1912. In fact, in *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 730 P.2d 186 (1986), this court rejected the argument that constitutional protections be frozen in time. 152 Ariz. at 17, 730 P.2d at 176. The defendant in *Boswell* argued that Article XVIII § 6 only protects to the extent that those same damages could be recovered at common law in 1912, even though the common law has evolved and now allows additional recovery. In rejecting the defendant's argument, this court stated:

> The law must allow for evolution of common-law actions to reflect today's needs and knowledge. Any other rule would allow those "long dead" to dictate solutions to problems of which

> they could not have been aware. [Citation omitted]

152 Ariz. at 18. Early case law, a few years after statehood, gave complete sovereign immunity to the state for the first time. *State v. Sharp*, 21 Ariz. 424, 189 P. 631 (1920). Prior to 1920, sovereign immunity did not exist in Arizona. In 1963, the Arizona Supreme Court clearly discarded the doctrine of sovereign immunity. *Stone v. Arizona Highway Commission*, 93 Ariz. 384, 381 P.2d 107 (1963). Subsequently, the Arizona Supreme Court held that the adoption of A.R.S. § 12-821 did not constitute a new grant of power to the courts over governmental torts. Rather, the people are endowed with the right to bring suit against the government for its tortious conduct. It is immunity that is the exception:

> Accordingly, the right to sue the states is not a statutory grant, as is the case in several other states; rather, it is a common law *rule in Arizona that the government is liable for its tortious conduct and immunity is the exception*. [citation omitted].

Pirtchard [sic] *v. State of Arizona*, 163 Ariz. 427, 788 P.2d 1178 (1990) (emphasis added).[2]

It is clear from these cases that Arizona did not recognize sovereign immunity before statehood. It was recognized for the fist time in 1920 by judicial decree and discarded by judicial decree in 1963. All of this was done

---

[2] The Arizona Supreme Court went on to hold that A.R.S. § 12-821 is not jurisdictional, and the State has power to do equity and excuse those who do not meet the requirements of the statute of limitation. *Pirtchard* [sic] *v. State of Arizona*, 163 Ariz. 427, 788 P.2d 1178 (1990).

by judicial decree, not by any act of the legislature. The common law right to sue the government, found by further judicial decree in 1990, is nonetheless protected by the Constitution.

There is a fundamental right to sue the state (or any other tortfeasor, for that matter) for negligence. The Court of Appeals applied the wrong standard of review and should have subjected this statue [sic] to the strict scrutiny test.

Everyone seems to agree that A.R.S. § 12-821 cannot pass a strict scrutiny test. However, even under the less exacting test of rational basis, this statue [sic] must be struck down.

2. A.R.S. § 12-821 violates Article 2, § 13 of the Arizona Constitution (the Equal Protection Clause).

The Arizona Constitution requires equal privileges and immunities under the law:

> No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

Article 2, § 13 of the Arizona Constitution.

This provision of the Arizona Constitution has been used by the Arizona Supreme Court to invalidate special laws relating to medical malpractice cases, as opposed to non-medical malpractice cases. *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961 (1984). The analysis in *Kenyon*

compels the same result here. *See also, White v. State,* 661 P.2d 1272, 1275 (Mont. 1983) (striking down a statute which discriminated between ordinary tort claimants and those with claims against governmental entities).

Kenyon holds that the legislature has the power to enact shorter statutes of limitations for some *claimants.* However, Kenyon does not hold that the legislature can enact shorter statutes of limitations for some *defendants.* The Supreme Court in *Kenyon* stated:

> Our holding today does not take from the legislature the power to regulate by enacting statutes of limitation. It may well be that medical malpractice claims, as a class, are sufficiently different from other claims or create such different social and economic problems that the legislature may set a different limitation period for such claims than for other malpractice claims or other tort claims in general. *Classification of claims for limitation purposes has traditionally been a legislative prerogative;* we do not disturb that prerogative. *It is one thing, however, to regulate by classification in setting up reasonable periods within which to bring an action, and it is another thing to confer a special privilege upon one class of defendants* by effectively abolishing the opportunity for those with even the most meritorious claims to assert them. When the legislature undertakes the latter, it impinges upon the fundamental rights guaranteed by our state constitution and it then becomes the duty of this court to declare such actions void under that constitution.

Kenyon v. Hammer, 142 Ariz. 69, 87, 688 P.2d 961, 979 (1984).

Here the legislature has clearly conferred on one class of defendants (public entities and public employees) a special privilege not available to other citizens and corporations. The Arizona Constitution does not permit this classification of defendants. The one-year limitation of the statute must be struck down.

For example all workers' compensation carriers are governed by the same rules, whether it is the State Fund or a private insurance carrier. A.R.S. § 23-986(A). The legislature has the power to pass laws governing workers' compensation, but does not have the power to give the state special treatment or protection. The reason for this is obvious. The state is competing with private insurance carriers for workers' compensation premium dollars. They must be governed by the same rules. In Mr. Hightower's case the state was competing for entertainment dollars by putting on a county fair. They should be governed by the same rules that apply to private places of entertainment.

In the Response to Petition for Review, the government states that the "one-year statute of limitations is not an absolute bar to suit, but merely a procedural regulation of a claimant's ability to sue the state, which allows a reasonable time after discovery of the claim to pursue the matter in court." The government misses the point. The point is not whether one year is a reasonable time to require suit to be brought. The point is equal protection. If one year is a reasonable time to bring suit for injuries, why do persons injured by non-governmental defendants get two years?

The real life problem that A.R.S. § 12-821 creates is that Arizonans generally know they have to file injury claims in two years. However, few know of the one-year statute of limitations for public entities. Mr. Hightower is a good example of one who thought he had two years and postponed going to a lawyer until after one year. He was unable to get the defendants to settle with him in the first year. He then went to see a lawyer for the first time. He was surprised to learn of the special one year statute of limitations for governmental entities.

If the legislature changed the statute of limitations for all tort claims to one year, it would likely be upheld. The word would likely get out to the public. The television advertising lawyers would no doubt make this the subject of their informational advertisements as it would affect every personal injury claim. Because this special one-year statute of limitations applies only to a small number of claims, it is not widely known.[3]

A.R.S. § 12-821 gives the State of Arizona a special one-year statute of limitations for personal injury claims such as the present one, where all other citizens and corporations have a two-year statute. It is unconstitutional and should be struck down by this court.

---

[3] The confusion caused by the 1994 referendum made it appear to the average voter that the one-year statute was being rejected.

3. Article 4, Part 2, § 18 of the Arizona Constitution does not grant permission for the legislature to grant the state a special statute of limitations.

Before a right to sue the government can be limited, the people must grant the legislature the authority to make such limitations in the Arizona Constitution. However, the Arizona Constitution states as follows:

> The legislature shall direct by law in *what manner* and in *what court* suit may be brought against the state.

Arizona Constitution, Article IV, Part 2, § 18 (emphasis added). From this provision, the legislature is endowed with the power to determine *only* 1) in what manner, and 2) in what court suit may be brought. For example, the legislature has the authority to determine how service of process is to be completed. A.R.S. § 12-822. As for in what court suit may be brought, the legislature has passed statutes on this issue as well. A.R.S. § 12-401(15) & (16).

Conspicuously absent is *any* authority that gives the legislature the ability to provide a shorter statute of limitation when the state or one of its political subdivisions in a party. Although the legislature has the power to enact statutes of limitations, there is no authority that it has the power to grant the state a shorter statute of limitations than other tortfeasors are granted.

The legislature has provided different time periods for statutes of limitation for different "types" of actions. For example, debts under a written contract have a longer period of time (six years) (A.R.S. § 12-548) in order to

promote settlement of differences between people who have sought each other out, as opposed to torts for personal injuries (two years) (A.R.S. § 12-542). However, there is no rational basis for the state giving itself a one-year statute of limitations when all other personal injury defendants have a two-year statute.

The plain language of the Constitution itself does not grant the state the authority to grant itself a shorter statute. The Constitution says: "The Legislature shall direct by law in *what manner* and in *what court* suit may be brought against the State." Arizona Constitution, Article IV, Part 2, § 18. If the people of the State of Arizona had intended to grant the legislature the power it now assumes, the Constitution would have stated, "The legislature shall direct by law in *what manner,* in *what court,* and *at what time* suit may be brought against the State."

We are not asserting here that the notice of claims requirement of A.R.S. § 12-821.01 is unconstitutional, but that the preferential one-year statute of limitations in A.R.S. § 12-~~821 is~~ unconstitutional. The reasons for a previous one-year claims requirement were set forth by the Arizona Court of Appeals: to provide the state with notice and an opportunity to investigate and assess its liability, permit the possibility of settlement prior to litigation and to assist in fiscal planning or budgeting. *State v. Brooks,* 23 Ariz. App. 463, 534 P.2d 271 (1975). However, there is no rational basis for the state giving itself a one-year statute of limitations when all other personal injury defendants have a two-year statute.

The only arguments made in the Response to Petition for Review that there is a rational basis for the one-year

statute, are that the shorter statute "fosters prompt investigations, encourages prompt repair, enables early settlement between a citizen and his state, and allows for fiscal planning by the State, which is self insured. . . . " (Response to Petition for Review, p. 9).

These might be interesting arguments for the constitutionality of the notice requirement of A.R.S. § 12-821.01. Requiring claimants to notify the public entity of claims within 180 days might foster prompt investigations, encourage prompt repair, enable early settlement between a citizen and his state, and allow for fiscal planning. However, none of these arguments demonstrates a rational basis for giving the state a short statute of limitations, let alone passing strict scrutiny.

It is not explained how a short statute of limitations fosters prompt investigations. In our experience government agencies investigate accidents and claims as soon as possible after learning of them. This is done because the investigation is always more effective before memories fade and documents are inadvertently destroyed. If notice is given as required by statute, the opportunity for prompt investigation is provided. A shorter statute of limitations does nothing to foster prompt investigation.

Any repairs that prove necessary are made immediately after the investigation. One can hardly imagine a state employee submitting his report of a needed safety repair: "We have determined the need to repair our facility, but recommend we wait until the two-year statute of limitations runs!" This would never happen.

Early settlement will hardly be fostered by a short statue [sic] of limitations. More likely, a short statute of limitations encourages the state to refuse to settle and hope that the injured citizen will blow the short one-year statute of limitations. With a short statute, the state may get out of paying for some injuries it would otherwise be responsible for, but a short statute does not translate into early settlements. Often there isn't even time to complete necessary medical treatment within the first year.

Fiscal planning for self-insured governments is not aided by a short statute of limitations. First, the notice requirement of A.R.S. § 12-821.01 provides more than adequate opportunity for self-insured governmental agencies to plan for claims payments. Furthermore, not all entities entitled to the protection of A.R.S. § 12-821 are self-insured. The statute protects "any public entity or public employee." A.R.S. § 12-820(6) defines "public entity" as the state and any political subdivision of the state. Irrigation, power, electrical, agricultural improvement, drainage, and flood control districts, and tax-levying public improvement districts are political subdivisions of the state. Arizona Constitution, Article XIII § 7. Similarly, the Arizona Constitution refers to charter counties as "political subdivisions of the state. . . . " Arizona Constitution, Article XII § 7. Cities, towns, and counties are political subdivisions of the state. A.R.S. § 2-321; A.R.S. § 38-382(3); A.R.S. § 41-563(E)(3); A.R.S. § 49-581(14). Occasionally, the phrase "political subdivision" is defined for specific statutes to include such entities as school districts [*See, e.g.*, A.R.S. § 38-701(4); A.R.S. § 35-468], taxing districts [A.R.S. § 49-1001(12); A.R.S. § 35-468], and multi-county water conservation districts

[A.R.S. § 35-511(2)]. Some of these entities are insured by insurance companies. See e.g., *City of Glendale v. Farmers Ins. Exchange*, 126 Ariz. 118, 613 P.2d 278 (1980) (City sued its insurer for breach of duty of good faith by reason of its failure to offer tort plaintiff full policy maximum in settlement). *Amicus Curiae*, Mr. and Mrs. Hightower, sued Coconino County, which was insured by ITT Hartford Insurance Company.

There might be some justification for the legislature granting a shorter statute of limitations for self-insured corporations or governments. But there is no justification for giving the government a special statute of limitations just because some governments are self-insured and might need to do some special fiscal planning.

A.R.S. § 12-821 violates the equal protection clauses of both the Arizona Constitution (Article 2, § 13) and the U.S. Constitution. It is not saved by Article 4, Part 2, § 18 of the Arizona Constitution.

CONCLUSION

The Arizona Supreme Court should accept jurisdiction of the petition for review to decide the important issue of whether the special one-year statute of limitations for the state and its political subdivisions is constitutional.

A.R.S. § 12-821 violates the Arizona Constitution, Article IV, Part 2, § 19, in that it is a special law granting the state a special statute of limitations.

A.R.S. § 12-821 violates Article 2, § 13 of the Arizona Constitution, in that it gives the State of Arizona a special

one-year statute of limitations for personal injury claims such as the present one, where all other citizens and corporations have a two-year statute.

RESPECTFULLY SUBMITTED this 8th day of May, 1998.

ARNETT & ARNETT

/s/
Wayne C. Arnett

/s/
Mark W. Arnett
4600 S. Mill Avenue • Suite 280
Tempe, Arizona 85282
Attorneys for *Amicus Curiae,*
JAMES AND MINERVA HIGHTOWER

APPENDIX K

IN THE SUPREME COURT OF THE STATE OF ARIZONA

KIRK D. PIKE and MARY IRENE PIKE, Plaintiffs-Appellants, vs. ARIZONA DEPARTMENT OF TRANSPORTATION; DAVID RAY SEMM and JANE DOE SEMM husband and wife, Defendants-Appellees,	Supreme Court No.: CV-98-0149-PR Court of Appeals No.: 1-CA-CV 96-0443 Maricopa County Superior Court No.: CV 95-10616

BRIEF OF AMICUS CURIAE ARIZONA TRIAL LAWYERS ASSOCIATION

Amy G. Langerman, Esq. 009174
THE LANGERMAN LAW OFFICES
350 East Virginia, Ste. 100
Phoenix, Arizona 85004
Chairman of the Amicus Curiae Committee – Arizona Trial Lawyers Association

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ..... iii, iv

I. INTRODUCTION 1

II. LEGAL ARGUMENT 2

A. STATUTES OF LIMITATIONS ARE ANALYZED DIFFERENT UNDER THE CONSTITUTION THAN IMMUNITY STATUTES 2

B. NEGLIGENCE ACTIONS AGAINST GOVERNMENTAL ENTITIES ARE FUNDAMENTAL RIGHTS PROTECTED BY ARTICLE 18, SECTION 6 OF ARIZONA'S CONSTITUTION 4

C. A ONE YEAR STATUTE OF LIMITATIONS THAT APPLIES SOLELY TO ONE GROUP OF TORTFEASORS IS AN UNCONSTITUTIONAL SPECIAL LAW 11

III. CONCLUSION 14

TABLE OF AUTHORITIES

CASES: **PAGE**

Anson v. American Motors Corp., 155 Ariz. 420, 747 P.2d 581 (App. 1987) 8, 9

Barrio v. San Manuel Div. Hosp. for Magma Copper Co., 143 Ariz. 101, 692 P.2d 280 (1984) 2, 3, 8, 9, 12

Boswell v. Phoenix Newspapers, Inc., 152 Ariz. 9, 730 P.2d 186 (1986), *cert. denied*, 481 U.S. 1027 (1987) 5, 6, 9, 10

Gosewisch v. American Honda Motor Co., 153 Ariz. 400, 406, 737 P.2d 376 (1987) 12

Hazine v. Montgomery Elevator Co., 176 Ariz. 340, 861 P.2d 625 (1993) 2, 6

Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984) 8, 9, 14

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 6

Missouri v. Holland, 252 U.S 416 (1920) 7

Ruth v. Industrial Comm'n, 107 Ariz. 572, 490 P.2d 828 (1971) 3, 13

Ryan v. State of Arizona, 134 Ariz. 308, 656 P.2d 597 (1982) 5, 7, 14

State v. Sharp, 21 Ariz. 424, 189 P. 631 (1920) 4

Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963) 5, 7, 14

STATUTES:

A.R.S. § 12-821 ..... 1, 10, 11, 13, 15

OTHER AUTHORITIES:

Ariz. Const. Article 4, Part 2, § 18 ..... 13, 15

Ariz. Const. Article 18, § 6 ..... passim

W. Renquist, *The Notion of a Living Constitution*, reprinted in W. Murphy, *Courts, Judges and Politics: An Introduction to the Judicial Process*, (3d Ed. 1979) 7

I. Introduction

This case presents the issue of the constitutionality of A.R.S. § 12-821, which provides a shortened statute of limitations with respect to personal injury actions against the government. The Arizona Trial Lawy6ers Association is concerned about the appellate decision in this case because of its analysis of Arizona constitutional law. We believe that the analysis by the Court of Appeals misapplies Arizona law. Most significantly, we disagree with one of the steps in the appellate analysis – a step that was unnecessary if the appellate court was of the belief that a one year statute of limitations is reasonable. Nevertheless, the appellate court concluded that the specific and unique provisions of Arizona's constitution, designed to protect the right of action to recover damages for personal injury, do not apply to governmental entities. This conclusion is contrary to law and provides an erroneous precedent which will serve only to mislead judges and lawyers. This is an important issue which impacts the lives of may victims throughout the state of Arizona. As a result, the Court should accept review in order to remove any doubt that the prohibition against abrogation of the right of action to recover damages steadfastly protects the citizens of our state regardless of who the tortfeasor may be.

II. Legal Argument

A. Statutes of Limitations Are Analyzed Differently Under the Constitution Than Immunity Statutes.

In analyzing the statute in question, the Court of Appeals first addressed the issue of whether the right of action against the government was a fundamental right, and subject to the protection afforded under Article 18, Section 6 of our constitution. The constitutional analysis of Statutes of limitations, however, is different than immunity statutes. The legal framework to analyze statutes of limitation preliminarily asks whether the law regulates or abrogates the claim that is being asserted. *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 342, 861 P.2d. 625 (1993). If the law merely regulates a right of action to recover damages, then no constitutional infirmity can exist. Only if the statute of limitations has the effect of abolishing the right of action is there any constitutional concern. *See, e.g., Barrio v. San Manuel Division Hosp. for Magma Copper Co.*, 143 Ariz. 101, 692 P.2d 280 (1984) (minor's statute of limitations in medical malpractice cases abolished the fundamental right to bring a cause of action in that it did not provide reasonable alternatives). The Court in *Barrio* reasoned:

> If [the statute] . . . were to be construed as taking away the right to pursue the constitutional action of negligence without granting a reasonable election to all persons entitled thereto, it would indeed be unconstitutional. . . .

Barrio, 143 Ariz. at 106 (citing *Ruth v. Industrial Comm'n*, 107 Ariz. 572, 575, 490 P.2d 828 (1971)).

The reasonable election test allows the legislature to regulate a cause of action so long as it leaves a claimant reasonable alternatives or choices enabling him to bring the action. *Barrio, supra,* 143 Ariz. at 106. The legislature may nor, however, "under the guise of 'regulation,' so effect the fundamental right to sue for damages as to effectively deprive the claimant of the ability to bring the action". *Id.* (citation omitted).

Thus, a *reasonable* statute of limitations does not abrogate a right of action. In the present case, AzTLA takes no position on whether a one year statute of limitations is reasonable or unreasonable. That is an issue inherently for the appellate courts of this state to decide. However, if the appellate court believed that a one year limitation period was a reasonable time frame in which to bring a tort action against a governmental entity, and that there is nothing unconstitutional about carving out such a special rule for one class of tortfeasors (*see infra*), then there was no reason for the court to venture into an Article 18, Section 6 analysis. Since the court, nevertheless, embarked on that tortuous course, AzTLA must object to the appellate court's handling of this constitutional issue.

B. Negligence Actions Against Governmental Entities Implicate Fundamental Rights Protected by Article 18, Section 6 of Arizona's Constitution.

The Court of Appeals, while correctly stating that the state may legislate governmental tort liability and set time limits for bringing suit, incorrectly leaps to the conclusion that the right to sue the state is not a fundamental

right. Slip Op. at p. 8, ¶¶ 16-17. The Court of Appeals' opinion is based on its view of "the history of the sovereign immunity doctrine and case law developments". The appellate court's revisionist view of governmental liability led it to conclude that "the constitutional right to recover for injuries does not include a fundamental right to sue the state for negligence." Slip Op. at p. 7 ¶ 14. Because the court concluded that claims against governmental entities are not fundamental rights, the appellate court utilized the rational basis test and, not surprisingly, upheld a law which adopts a shorter statute of limitations period for claims against the state than for claims against private tortfeasors. *Id.* at p. 11 ¶ 20.

Admittedly, Arizona at one time embraced the doctrine of sovereign immunity. *See State v. Sharp*, 21 Ariz. 424, 189 P. 631 (1920). However, this Court expressly abolished sovereign immunity calling it "an anachronism without rational basis" that survived solely on the grounds of "antiquity and inertia". *See Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 392, 381 P.2d 107 (1963). In 1982, this Court proclaimed that the duties of all Arizona governmental entities would be "coextensive with those owed by others." *See Ryan v. State of Arizona*, 134 Ariz. 308, 310, 656 P.2d 597 (1982). In other words, the government would be treated like private citizens. *Id.* As Judge Grant noted in her dissent below, *Ryan* stressed that "the rule is liability and immunity is the exception." Slip Op. at 19, ¶ 35 (citing *Ryan*, 134 Ariz. at 309).

The contention that the protections guaranteed by Article 18, § 6 do not extend to negligence actions against governmental entities is based on the argument that at the time our Constitution was adopted, such actions were

prohibited by the doctrine of sovereign immunity. Such an argument, however, is patently flawed. Indeed, to adopt such a position would thrust Arizona's Constitutional protections back to the stone age and freeze our common law to that which existed at the time of our constitutional convention. This Court specifically rejected such an approach in *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 730 P.2d 186 (1986), *cert. denied*, 481 U.S. 1027 (1987).

In response to the suggestion that Article 18 § 6 protects only causes of action that were recognized at the common law at the time our Constitution was adopted, this Court in *Boswell* stated:

> Although Article 18 § 6 preserves common law rights, our common law is not frozen as of 1912. (citation omitted). The constitutional protection extends to wrongs recognized at common law, but it is not limited to those elements and concepts of particular actions which were defined in our pre-statehood case law. Article 18 § 6 protects the right of the people to seek "remedy by due course of law" for injury to their "lands, goods, persons, or reputation." The law must allow for evolution of common law actions to reflect today's needs and knowledge. Any other rule would allow those "long dead" to dictate solutions to problems of which they could not have been aware.

152 Ariz. at 17-18. The Court in *Hazine* reaffirmed this position. In rejecting the argument that Article 18, section 6 does not apply to product liability actions, because such actions were not recognized in our prestatehood common law, the court stated: "[w]e agree with the unanimous

Boswell court that this constitutional protection [Article 18, § 6] is not limited to those elements and concepts of particular [causes of action] which were defined in our prestatehood case law." 176 Ariz. at 343-44 (citing *Boswell*, 152 Ariz. at 18).

Indeed, this Court has explicitly espoused the ideology that constitutions must live and breathe life into new generations. This is not a novel concept. In 1819 the United States Supreme Court noted as much: "A constitution [is] intended to endure for ages to come and, consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Consistent with this philosophy, and in anticipation of the mysteries of the future yet to be revealed, our Constitutional framers used general language which became the courts' duty to interpret and apply to current events. One of Arizona's most notable jurists endorsed this philosophy:

> The framers of the Constitution spoke in general language and left to succeeding generations the task of applying the language to the unceasingly changing environment in which they would live. . . . Merely because a particular activity may not have existed when the Constitution was adopted, or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that the general language to the Constitution may not be applied to such a course of conduct. Where the framers of the Constitution have used general language, they have given latitude . . . to make that language applicable to cases that the framers might not have foreseen.

W. Renquist [sic], *The Notion of a Living Constitution*, reprinted in W. Murphy, *Courts, Judges and Politics: An Introduction to the Judicial Process* (3d Ed. 1979). In short, each case "must be considered in the light of our whole experience and not merely in light of what we said a hundred years ago." *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

Accordingly, while the state enjoyed immunity from liability under the doctrine of sovereign immunity at the time our constitution was adopted, the development of our common law establishes that the constitutional right to recover for injuries also includes the fundamental right to sue the state for negligence. The stay on our pre-statehood common law was released in *Stone v. Arizona Highway Comm'n*, which declared sovereign immunity to be unjust, outmoded, and illogical. 90 Ariz. at 393-94. The abolition of sovereign immunity was solidified in *Ryan v. State, supra*. Thus, the majority's analysis, which relied upon the law as it existed in 1910, and its attempt to grant sovereign immunity a foothold in modern Arizona, should be rejected by this Court.

Moreover, contrary to the majority's succinct assertion, its holding does contradict *Kenyon, Barrio* and *Anson*. *See* Slip Op. at 8, ¶ 17. The fact that those cases did not involve governmental entities is an irrelevant distinction. Those decisions recognized the guarantees of Article 18, § 6 and did not limit their holdings to any particular category of defendants named therein.

The decisions in *Kenyon, Barrio* and *Anson* all stand for the same proposition: The right of action to recover damages for personal injury is constitutionally protected in Arizona. None of the cases sustained laws that had the

effect of abolishing the right of action that the Court was striving to protect. In each of those cases any limitation on the constitutionally protected right of action was not allowed. All of these cases relied upon the analysis adopted by this Court in *Kenyon*. As Judge Grant noted in her dissent below, the Court in *Kenyon* "decreed that this [the protection from abrogation] is a specific and strong requirement." Slip Op. at 17, ¶ 31 (citing *Kenyon v. Hammer*, 142 Ariz. at 74).

Despite that specific and strong requirement, the appellate decision in this case would sanctify any statutory limitation on claims against governmental entities since, according to the appellate rationale, such claims are not subject to constitutional protection. Insofar as laws affecting nonconstitutional rights of action are tested under the rational basis test, virtually any type of restriction would likely be sustained. A rational basis can be found for virtually any type of legislative succor that is passed to help out government. Saving taxpayers money always sounds like a good idea, even if the quid pro quo is the stripping of access to and remedy by the civil justice system.

Contrary to the majority's assertion, its decision erodes the constitutional protections afforded by Article 18, § 6. Moreover, the majority's attempt to distinguish the present case from the earlier cases of *Kenyon*, *Barrio*, and *Anson*, on the basis of a difference in defendants, flies in the face of the precise language of the clause and the language of those decisions.

This Court surely removed any doubt concerning the scope of Article 18, § 6 in *Boswell, supra.* There, the Court stated:

> The language of art. 18 § 6 gives no hint that the framers intended to restrict its protection. . . . Its language is plain, clear, and all inclusive. Section 6 does not speak of negligence actions, but of the "right of action to recover damages." It mentions no particular type of damage, *but speaks instead to the "broad right . . . to recover damages for injuries." Article 18, § 6 contains no restrictive adjectives or phrases.*
>
> The constitutional text being unrestricted, *it would be inappropriate for this court to restrict the guarantee by adding words of limitation* contrary to the plain language used. *We should not narrowly interpret the provision "in direct derogation of the express rights guaranteed in section 6,* unless compelled to do so by prior construction that illuminates the framers' intent.

Boswell, 152 Ariz. at 13 (emphasis added) (citations omitted). This Court has emphatically stated that it is inappropriate for a court to restrict the protection guaranteed by Article 18, section 6. Nevertheless, that is exactly what the majority has done in exempting the state from the terms of the provision.

In summary, AzTLA is greatly concerned by the majority's reasoning that a cause of action to recover damages against the state is not a fundamental right because such a cause of action did not exist at the time of the adoption of Arizona's Constitution. The majority's reliance on the doctrine of sovereign immunity in order to shield the state from liability is particularly troubling.

Thus, if this Court concurs with the result of the Court of Appeals, but for a different reason, (i.e., if the Court believes that A.R.S. § 12-821 reasonably regulates rather than abrogates rights of action), or if the Court agrees with the petitioner for a reason unrelated to Article 18 § 6, AzTLA urges the Court to disavow or depublish the Court of Appeals' opinion. Otherwise, the analysis contained therein will set a confusing and misleading precedent the next time a law is passed which provides an immunity for governmental defendants.

C. A One Year Statute of Limitations that Applies Solely to One Group of Tortfeasors is an Unconstitutional Special Law.

The brief of amici James and Minerva Hightower establishes that granting a special one year statute of limitations for the state and its political subdivisions violates Article IV, Part 2, § 19 of our constitution. That clause is clear: No local or special laws shall be enacted in certain cases, including limitations of civil actions. Yet that is precisely what A.R.S. § 12-821 does. It confers a special one year statute of limitations on a specific defendant. As such, and for all the reasons set forth in amicus Hightower's brief, with which AzTLA concur and join, this Court should strike down A.R.S. § 12-821 as an impermissible special law.

In addition to joining the arguments raised by amici Hightower, AzTLA is here to address defendants-appellees' objection to the filing of the Hightower amicus brief. Defendants-Appellees argue that the Court should reject the Hightower amicus brief because "it attempts to insert

new issues into this case that have heretofore not been raised or briefed." In essence, Defendants-Appellees want to put form over matter which may result in an unconstitutional decision on the books. Allowing such an outcome does nothing but promote bad law and bad public policy.

Defendants-Appellees' concern that, by considering amici Hightower's brief, this Court is allowing a type of "end run", is also without merit. Questions of constitutional guarantees and violations thereof may be raised initially on appeal and decided in the exercise of the Supreme Court's discretion. *Gosewisch v. American Honda Motor Co.*, 153 Ariz. 400, 406, 737 P.2d 376 (1987). In *Gosewisch*, the trial court gave a "misuse" jury instruction in a products liability case. At trial, the plaintiffs' only objection to the instruction was that it lacked evidentiary support. On appeal, however, an amicus asserted that the instruction also violated Article 18 § 5 of the Arizona Constitution. The defendant in *Gosewisch* argued that the plaintiff had failed to raise the constitutionality objection at trial. Nevertheless, this Court observed that constitutional arguments are not automatically waived by failure to object in the trial court. Rather, such constitutional challenges may be considered for the first time on appeal. Thus, this Court is vested with authority to declare laws unconstitutional regardless of whether first addressed in lower courts.

The Supreme Court may also address issues not previously raised in the lower courts which are of "general statewide significance". *See Bârrio v. San Manuel Div. Hosp. v. Magma Copper, supra.* In *Barrio*, the plaintiff argued to this Court that A.R.S. § 12-564(D), which

required that a minor injured under the age of seven bring his or her action for damages before age ten, was void pursuant to Article 18, § 6 of the Arizona Constitution. Defendants challenged the plaintiff's right to raise this argument because she had failed to raise it to the trial court, as well as to the Court of Appeals until the motion for rehearing. This Court, in allowing plaintiff's newly-raised argument, relied on the well-recognized exception to the general rule that a party may first raise on appeal an issue which is of "general statewide significance." 143 Ariz. at 104 (quoting *Ruth v. Industrial Comm'n*, 107 Ariz. 574, 490 P.2d 828, 830 (1971)).

Here, the issue of whether the reduction of the period of time within which citizens may bring suit against the state and its employees for tortious conduct is an impermissible special law, and thus unconstitutional, is certainly of statewide significance – to state agencies and their employees, as well as to their victims. Given the constitutional importance and statewide significance of the issue involved, the Court should seize the opportunity to evaluate whether A.R.S. § 12-821 violates Article 4, Part 2, § 18 of the Arizona Constitution which prohibits the legislature from granting the state a special statute of limitations, irrespective of the path by which this challenge made its way to this forum. It is particularly important for the court to address this issue since the appellate decision was published and was based on a flawed analysis of Arizona constitutional law. By allowing the decision to stand, practitioners considering claims against the government on behalf of other victims may be misled into believing that the statute is constitutional even though not all constitutional arguments were analyzed in the

decision. As can be seen from this case, many attorneys and judges are unfamiliar with the unique provisions of Arizona's constitution; allowing a decision to stand which is incomplete will serve to close the courthouse doors to other victims of governmental misconduct.

III. Conclusion

The hallmark of Article 18, § 6 is the right to be protected. The right involved in this case is the right of action to seek damages for personal injuries. That right has been constitutionally recognized and preserved by this Court over and over in the last 15 years since *Kenyon* was decided. Nowhere is there any law or logic that supports the conclusion that the constitutional protection applies to any and all tortfeasors *except* governmental entities. *Stone* and *Ryan* firmly chastised any special treatment for governmental tortfeasors. Rather, the King is to be treated just like everyone else.

In one fell swoop, the Court of Appeals has done what it is not permitted to do: restrict the protections of Article 18, § 6. Thus, even if a one year statute of limitations is reasonable or if governmental defendants are entitled to special laws, the decision of the Court of Appeals must be vacated and its analysis rejected as constitutionally flawed.

Furthermore, the Court should accept, and consider, the brief of Amicus Hightower. The fact that the argument based on the prohibition against special laws has not previously been raised, is not an impediment to this Court considering it now. Indeed, this argument is worthy of the Court's attention and should not be ignored on

procedural grounds. Thus, AzTLA asks the Court to declare A.R.S. § 12-821 violative of Article 4, Part 2, § 18 of Arizona's Constitution.

Respectfully submitted this 2nd day of September, 1998.

THE LANGERMAN LAW OFFICES, P.A.

By /s/ Amy G. Langerman
AMY G. LANGERMAN
350 East Virginia Avenue
Suite 100
Phoenix, Arizona 85004-1216
Chairman of the Amicus Curiae
Committee – Arizona Trial
Lawyers Association

APPENDIX L

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

KIRK D. PIKE, et ux., Plaintiffs, -vs- ARIZONA DEPARTMENT OF TRANSPORTATION, et al., Defendants.	)	No. CV95-10616 DEFENDANTS' MOTION DISMISS

BEFORE: THE HONORABLE PAUL A. KATZ,
Judge of the Superior Court

Phoenix, Arizona
April 17, 1996
8:30 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Prepared for:	Jeffrey D. Klein
APPEAL PURPOSES	Official Court Reporter
copy	Superior Court

[p. 2] APPEARANCES:

For the Plaintiffs	Douglas B. Price, Esq.
For the Defendants	Deborah J. Spinner, Esq.

PROCEEDINGS

THE COURT: This is the time set for hearing oral argument in the motion to dismiss in the Pike vs. Arizona Department of Transportation matter, civil cause number 95-10606.

I will ask counsel who are present to please identify themselves for the court record.

MR. PRICE: Doug Price for the plaintiff, Your Honor.

MS. SPINNER: Deborah Spinner for the State.

THE COURT: In one moment I will entertain argument. Just one word of advise [sic] because this case has been pending, the motion for quite sometime.

If in the future there are any agreements to tamper with the Rules of Civil Procedure you need to get only an order from me because what I did in this case is there wasn't timely response filed. We didn't have the docket – well, the docket was automated but the Clerk's office wasn't quite as efficient as they are now and we checked the docket and there is no response indicated on the [p. 3] docket on December 20th, 1994. There was a copy of the response in the file. It had in fact been filed on December the 19th which was one day before I ruled and I didn't receive a copy of it and I don't care if there is an agreement between the parties, but under the rules if a timely response isn't filed and I have something sitting on my desk I have the right without oral argument to determine the matter submitted and any right to respond is waived so I am not angry or upset we ended up wasting each other's time and a couple of trees over something that

should have been here for oral argument to begin with rather than going by way of a motion for reconsideration.

So with that in mind, I will say nothing further on that issue.

I have had the opportunity to read the motion to dismiss, the response and the reply. I am familiar with the particular issues at bar. It's not the first time I had this particular issue. Each fact scenario is a little bit different and I am well aware of the fact that there was a period of time in 1993 we had basically kind of a void in terms of what the statute of limitations was with respect to claims against municipalities or governmental agencies and then I believe in July 1994 the current statute became affective [sic].

So I'm interested in at least hearing your [p. 4] respective arguments with respect to where this case falls factually and it is the State's motion to dismiss.

My one idiosyncracy for those who haven't had the pleasure or misfortune of practicing in front of me is I will ask you use the podium. It's not necessarily in a real comfortable or convenient place thanks to the lawyers that preceded you. I will ask you to argue your respective positions from the podium. Whenever you are ready to proceed.

MS. SPINNER: Judge, the date of loss in this case was August 2nd, 1993. And now with the comments Your Honor just made, I will just maybe ask a question of the Court.

My understanding is – I have some of my notes that the effective date of the new statute of limitations was July 14th of 1993. Your Honor said '94.

THE COURT: That may be right. Hold on a second. It is 12-241, isn't it?

MS. Spinner: No, 821.

THE COURT: Okay. If you look in the hard book there is 12-821 originally effective 1994. There was a 1992 or '93 amendment that ended up being repealed but 12-821, the current section, was added in 1994 which would have been added by law of 19 – wait a minute. Added by law in 1993, Chapter 90, Section (A) of Laws of 1994, Chapter 162, [p. 5] Section 1.

The 1994 amendment deleted personal injury – well, I think the immediate amendment became effective on July 1st, 1994. I could be wrong in that regard. But I know there was some unusual happening in either 1992 or '93 and it's been probably a couple months.

MS. SPINNER: Well, let me tell you what I believe.

THE COURT: Go ahead.

MS. SPINNER: The law and history in 1993 it became effective all personal injury actions must be brought within one year. And then in 1994 they changed that to delete personal injury actions and they said all actions.

This case it is a personal injury action so it is our position, my understanding that it was the one year statute of limitations at the time this case accrued, but in any event reading 12-505 which says what do you do if the statute of limitations changes, it still says it is to be applied retroactive and unless the case would be barred, you're still bound by the retroactive application of the

statute of limitations. So I think in any event their Complaint had to be filed by October 2nd, 1994, And there is no dispute that it wasn't filed on that date in this case.

In their Response they say that it was referred but in fact this section Senate Bill 1055 was not referred. [p. 6] The vast majority of it was, but this statute of limitations was not referred so there is a one year statute of limitations against the State and I think, you know, regardless of whether the effective date is 1993 or 1994 under 12-505 which deals with a change in the statute of limitations, plaintiffs only had until August 1994 to file the Complaint. They didn't file it in a timely manner.

There is some mention in the response that well then it is unconstitutional but they certainly hadn't met the burden in this case showing the statute is unconstitutional.

That's our position. That's really all the State has to say.

THE COURT: Let me ask you where the provision is with respect to – and again we may not be operating under – I thought there was the requirement – the first to fire – I am looking at 821, the latest version, which was promulgated in 1994 and I think that you're correct in 1993 the legislature passed the statute requiring all personal injury actions against public entities and public employees to be brought within one year after the cause accrues and then in 1994 effective July 1st, 1994 it included all actions rather than personal injury actions.

But I thought that there still had to be a claim asserted or filed against the agency and it would be

denied [p. 7] within the first six months as a precursor to the filing of the action.

MS. SPINNER: It does now and this is where things got really confusing. At one point the legislature repealed 12-821 which was the claim statute.

THE COURT: Right.

MS. SPINNER: Then that's when Senate Bill 1055 came up and that was part of 1055 where they repealed the claim statute.

MR. PRICE: Then all of the tort reform was referred and then suddenly the State was left with no claim statute and no tort protection or immunities that Senate Bill 1055 provided so the following year the legislature passed another claim statute.

THE COURT: Which was the 12 -

MS. SPINNER: The 12-801.

THE COURT: That would have no application in this case.

MS. SPINNER: No.

THE COURT: No requirement in this case that it be referred or claim made to the agency, but that the case would have to have been filed one year of the cause accruing.

MS. SPINNER: In this particular case they did file notice of claim within one year but I don't think they [p. 8] were required to under the statute. I think this case fell in that window where we had no claim statute so our

only argument at this point is that they didn't file as per the applicable statute of limitations.

THE COURT: I have no other questions. Thank you.

MS. SPINNER: That's all I have. Thank you.

MR. PRICE: Your Honor, I hoped for a simple solution but I'm not sure I have one. I hoped for the solution under 12-505(c) which says that the amendment preexisting law shortens the statute of limitations. Then you have one year from the date of the new statute of limitations.

In fact, the way the facts in this case fall if the law was changed in July '93 and this accrued in August '93 the preexisting law wasn't from existing in August 1993. I am not sure we can rely on that.

THE COURT: I think we are – opposing counsel was correct that the new – I was really referring to the 12-821 with respect to the claim – we had the claim statute. Then we didn't have the claim statute and then had it again. But under the old statute, the old 821 that was promulgated in 1994 and remained in effect until 1993. There was still a requirement that the claim be filed in a manner prescribed in the Arizona Rules of Civil Procedure [p. 9] within twelve months after the cause of action accrued. That was the old statute.

I believe that in 1993 the legislature promulgated the new, shorter statute, and did not include within that the claim filing requirements and it became effective I believe in July. There was no emergency clause that it become

effective by operation of law on July 1st, 1993, about a month before this action.

MR. PRICE: July 17th.

THE COURT: July 17th.

MR. PRICE: I looked at my seminar book from the tort reform seminar that I had gone to in May 1993 and it is confusing. At that time I think it wasn't all referred and apparently something that wasn't referred was the statute of limitations so we are left with a one year statute.

I also provided the Court and my opposing counsel with not very good copies I am afraid, a case involving a Nevada statute addressing constitutionality, their one year tort claim and six month claim statute where they ruled that the statute was unconstitutional. They said there were constitutional problems with the idea of a one year statute.

First of all there are equal protection problems. You have a two year tort statute with respect to all defendants except for one. That's the State of Arizona. [p. 10] With respect to the State you have a one year statute. So there are serious equal protection problems and there are also due process problems that go with that.

In terms of the test for constitutionality, I will refer you to Canyon vs. Hammer located at 142 Ariz. 69, 688 P.2d. 1984, a Supreme Court case concerning the then three year medical malpractice statute of limitations and finding it unconstitutional and goes through a very extensive test involved whether the personal injury is a

fundamental right. Then there are compelling state interests and goes through a very thorough discussion.

Fundamentally the statute of limitations is a statute that its purpose is to prevent a stale claim, to prevent the surprise on a defendant of a claim coming out of the blue which the defendant is not aware.

In this case the State was certainly well aware of the claim against it. I had personally met with Esther Harkin (phonetic), a risk management adjuster, back in October '93 and corresponded with her in December '93. The notice of claim was given, although may not have been required on August 1st, '94. So this is not a case where the State is being caught unaware of this claim.

And there is a lot of case law to the effect that if it is unclear as to the statute of limitations, the facts and circumstances here with referendum, et cetera, [p. 11] making it unclear, that the Court has the discretion to give equitable relief in that situation.

Again I would like to address that more fully in a supplemental brief if the Court will allow that or I can address that right now.

THE COURT: No.

MS. SPINNER: Your Honor, just briefly, I don't think we should allow any additional briefing just because the original motion was filed in November. Any additional briefing that was needed certainly could have been supplemented. We could have incorporated it here in oral argument today rather than delaying this an extra couple months.

The statute is clear that it says an action must be brought within one year of the date that the claim accrued and shall not be brought afterwards. That's pretty clear. It was not referred and there is really no reason to allow an equitable tolling. Plaintiff is represented by counsel. There is nothing in the statute that allows excusable neglect.

With regard to the constitutional claim I was just provided this case right now so I am not prepared to argue that. But plaintiff has not met his burden which he is required to for the court to overturn a statute on constitutional grounds and they just haven't met their [p. 12] burden and it shouldn't be granted on that basis.

That's all I have. Thank you.

THE COURT: Counsel, a couple things. One, as a Superior Court Judge my duty is to enforce the law and the highest law in this state and country is the federal constitution, then the state constitution and then our statutes. But our statutes are presumed to be – we start out with that presumption and that they are valid and as a trial court judge it's not my duty to make decisions based upon my own political or philosophical beliefs.

I am not here to debate whether or not a one year statute of limitations is a wise public policy decision or a poor public policy decision. But the statutes of limitations have been upheld as valid repeatedly by our State Supreme Court and by the Supreme Court of the United States. And the equal protection argument doesn't fly because all citizens of the State of Arizona – for that matter any person whether they are citizens or not, who is injured within the borders of this state has the same

limitations place [sic] upon their claim if their claim is again the State or a political subdivision of the State of Arizona, so all citizens, all people are treated the same.

The State is afforded greater protection than would be a private citizen or a corporation or other non-governmental entity and there is a rational basis for that [p. 13] distinction. The legislature for right or wrong is trying to reach a balance between protecting the interests of the State for taxpayers' money and the citizens of the State might be exposed to liability for the State's misconduct or negligence against the rights of someone to recover for their injuries.

I am not going to allow any additional briefing. We have always tried to find a means of having cases heard on their merits and I would much rather have this tort claim action decided on its merits rather than being dismissed by virtue of the running of the statute of limitations but the legislature promulgated a statute that became effective July 1993, the revised A.R.S. Section 12-821.

And in looking at the annotated version of those statutes in the West publication it does indicate that the 1994 amendment by Chapter 162 deleted personal injury proceeding actions and involving acts that are alleged to have occurred within the scope of the public employee's employment, shall – but other than that in 1993 by the laws of 1993, Chapter 90, Section 8 which is codified at A.R.S. Section 12-821, all actions against it was then – personal injury actions against any public entity shall be brought within one year after the cause of action accrues and not afterward.

[p. 14] That was the law in effect at the time of this August 2nd, 1993 accident. Under the old statute which preceded this case, which preceded the medical statute, there was a requirement of filing a claim first and that claim would be denied, deemed denied within 60 days after submission so that might extend things until October 2nd, 1994. But the old statute doesn't apply. The new statute wasn't in effect at the time. There was no confusion.

There was an obligation to bring the action under the current law by August 2nd, 1994 and in no event any later under the old statute than October 2nd, 1994. This action wasn't filed until November 1995, almost two years after the accident.

So I find that there is a rational basis to the statute. It may be bad public policy. It may not be bad public policy but I'm not here to decide public policy.

I am going to grant the motion to dismiss. The action will be ordered dismissed at this juncture with prejudice because the statute clearly runs and there is no basis for a tolling or anything else.

Counsel, I certainly would welcome an appeal on this issue. If you can convince the Court of Appeals or the Supreme Court that your client's constitutional rights have been denied or this statute is unconstitutional, I certainly would be delightful [sic] in having this claim tried on its merits [p. 15] because I don't think that the State will suffer prejudice in terms of being able to investigate the claim. But the legislature promulgates the statute of limitations and I enforce those unless they are clearly or blatantly unenforceable.

We are not trying to change someone's substantive rights retroactively in this particular case. The statute was in effect before if injury occurred.

Anything further?

MS. SPINNER: No.

THE COURT: Thank you.

(End of proceedings)